89-366

Supreme Court, U.S.
FILED
AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

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WOMEN INVOLVED IN FARM ECONOMICS,
*Petitioner*,

v.

CLAYTON YEUTTER, SECRETARY OF AGRICULTURE,
AND UNITED STATES DEPARTMENT OF AGRICULTURE,
*Respondents*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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J. MICHAEL HEMMER
MITCHELL F. DOLIN *
JENNIFER S. DIVINE
DEBORA L. OSGOOD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
*Attorneys for Petitioner*

* Counsel of Record

August 1989

## QUESTIONS PRESENTED

This case concerns a Department of Agriculture regulation that automatically treats a husband and wife as "one person" for purposes of their earning federal crop program payments. The district court invalidated this one-person rule under the Administrative Procedure Act and the United States Constitution. The court of appeals reversed. Of pertinence here, the appellate court held that, because the regulation was exempt from the APA's requirement of a contemporaneous explanation, judicial review into whether the rule is arbitrary and capricious need not include an inquiry into the reasonableness of the agency's decisionmaking process and can be based on the *post-hoc* rationalizations of the agency's litigation counsel.

The questions presented to this Court are:

1. Whether the arbitrary-and-capricious standard for judicial review of agency action can be discarded when the agency's action was not required to be accompanied by a contemporaneous explanation.

2. Whether a court reviewing the validity of agency action can rely on *post-hoc* rationalizations of agency counsel simply because the agency's action was not required to be accompanied by a contemporaneous explanation.

3. Whether a regulatory scheme that automatically classifies a husband and wife as "one person"—but permits all other categories of related or interdependent individuals and entities to establish that they are separate from each other—can be considered anything other than arbitrary and capricious.

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### OPINIONS BELOW

The opinion of the court of appeals, reported at 876 F.2d 994, is reproduced in Appendix A, at 1a-27a. The memorandum opinion of the district court is reported at 682 F. Supp. 599 and is reproduced in Appendix C, at 30a-48a.

### JURISDICTION

On June 2, 1989, the court of appeals entered its judgment reversing the district court. Appendix B, at 28a-29a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

### CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

The Fifth Amendment of the United States Constitution; Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988); Section 101 of the

Agricultural Act of 1970 (codified at 7 U.S.C. § 1308 (5)(A) (1988)); and the Department of Agriculture's one-person rule, 7 C.F.R. § 795.11 (1988), are set forth, respectively, in Appendices E, at 50a, F, at 51a, G, at 52a, H, at 53a, and J, at 62a.

## STATEMENT OF THE CASE

1. The Agricultural Act of 1970, a comprehensive law authorizing a wide array of crop programs designed to support this country's farm economy and to facilitate government control over the supply of key agricultural commodities, was the first such statute to establish a dollar limitation on crop payments an individual "person" could earn annually. Pub. L. No. 91-524, § 101(1), 84 Stat. 1358. The 1970 Act further directed the Secretary of Agriculture to "issue regulations defining the term 'person' and prescribing such rules as he determines necessary to assure a fair and reasonable application of such limitation." *Id.*, § 101(4). Exactly eighteen days after the President's November 30, 1970, approval of this law, the Secretary of Agriculture issued implementing regulations in final form. 35 Fed. Reg. 19,339-41 (1970). For all categories of related or economically interdependent individuals or business entities except married couples, the regulations defined "person" in a manner permitting individual crop program participants to establish separate "person" status. *Id.* In the only departure from this general approach, the regulations provided that "[a] husband and wife shall be considered as one person." *Id.* at 19,340 (codified at 7 C.F.R. § 795.11 (1988)).

The record below is barren of any evidence as to why this one-person rule was promulgated. The Secretary did not seek comments, hold hearings, or attempt to explain his adoption of the rule. Prior to 1970, the Secretary had allowed farming husbands and wives to demonstrate the economic independence of their activities and thereby to qualify for individualized treatment. 31 Fed. Reg. 3487

(1966). The reasons the Secretary chose to adopt the more restrictive one-person rule in 1970 have never been disclosed.

Congress certainly did not call for such a draconian rule. The legislative history of the 1970 Agricultural Act reveals that, notwithstanding the statute's introduction of a payment limitation, the overwhelming Congressional sentiment, expressed in the official reports and the floor statements of the law's sponsors, was to encourage widespread participation in crop programs. *See* H.R. Rep. No. 1329, 91st Cong., 2d Sess. 16 (1970). As Representative Poage, Chairman of the House Agriculture Committee and Floor Manager of the bill, observed: "The whole success of the program is based on participation. . . . [W]e want participation, and we want it from everybody." 116 Cong. Rec. 27,452 (1970).[1] Although Congress did not want individual farmers to receive exorbitant payments, there is no indication in the statute or legislative history that the bill's proponents were concerned about preventing evasion of the newly-set payment limitation or wished to prevent farm couples from qualifying separately.

In fact, Congress rejected the one-person rule. A 1970 floor amendment, co-sponsored by Representatives Conte and Findley, would have required the Secretary of Agriculture to promulgate rules "to prevent the circumvention or evasion of [the payment] limitation." *Id.* at 27,141. In order to illustrate how the anti-evasion provision of his amendment—which Representative Conte called its "most important feature"—would be implemented if passed, Representative Conte placed into the *Congressional Record* draft regulations that included a rule ex-

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[1] *See also id.* at 27,132 (statement of Rep. Poage); *id.* at 27,134-35 (statement of Rep. Price); *id.* at 27,184 (statement of Rep. Montgomery); *id.* at 27,188-89 (statement of Rep. Abernathy); *id.* at 27,194 (statement of Rep. Rhodes); *id.* at 27,470 (statement of Rep. Foley).

plicitly treating a husband and wife as one "producer" for purposes of the payment limitation. *Id.* at 27,141-42. The Conte-Findley Amendment and a similar anti-evasion amendment in the Senate were both soundly defeated. *Id.* at 27,471, 31,793-94.[2]

After 1970, Congress repeatedly reenacted the statutory requirement that the Secretary promulgate "fair and reasonable" regulations respecting the per-person limitation without adopting provisions aimed at preventing circumvention or evasion of the payment limitation.[3] As in 1970, Congress rejected a number of anti-evasion measures in 1973, including one introduced by Representative Findley that would have required the Secretary to issue "efficient and economical" payment-limitation regulations instead of "fair and reasonable" ones. 119 Cong. Rec. 23,072 (1973). The House also rejected an amendment with a limitation identical in effect to the one-person rule, which would have applied a payment limitation to each "family farm unit," including a "spouse and issue." *Id.* at 23,972, 23,978.

The first serious Congressional emphasis on preventing payment-limitation evasion appeared in the recent Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. That Act contains detailed provisions intended to ensure that farmers cannot avoid payment

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[2] While the Secretary's one-person rule tracks language in the Conte-Findley draft regulations, key provisions of the 1970 regulations differ dramatically from the Conte-Findley draft. For example, Conte-Findley treated virtually all types of joint farming ventures and their venturers as one person; the 1970 regulations allow venturers to qualify separately. *Compare* 116 Cong. Rec. 27,142 *with* 35 Fed. Reg. 19,340.

[3] *See* Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, § 101(4), 87 Stat. 221; Food and Agricultural Act of 1977, Pub. L. No. 95-113, § 101(4), 91 Stat. 913; Agriculture and Food Act of 1981, Pub. L. No. 97-98, § 1101(5), 95 Stat. 1213; Food Security Act of 1985, Pub. L. No. 99-198, § 1001(5)(A)(ii), 99 Stat. 1354.

limitations through use of multiple corporate entities and other devices. *Id.*, § 1301-06. Although the 1987 Act reflects a concern over evasion that was absent in prior farm bills, it also specifically abrogates the one-person rule by providing that a husband and wife engaged in separate farm operations are to be treated as separate persons. *Id.*, § 1303(a)(2). The Secretary adopted this statutory provision in his new payment-limitation regulations, which became effective only with the 1989 crop season. 53 Fed. Reg. 29,576 (1988). That regulation is not at issue in this case.

2. Petitioner, a national non-profit organization of women involved in farming and agriculture, was founded in Sidney, Nebraska, in 1976. It filed this lawsuit to challenge the one-person rule in its original form and as it was to be applied through the 1988 crop season. Petitioner sought declaratory and injunctive relief aimed at invalidating the rule under the Administrative Procedure Act, 5 U.S.C. § 706 (1988), and the Fifth Amendment's equal protection and due process guarantees. Jurisdiction in the district court was premised on Sections 1331, 1346, 2201, and 2202 of Title 28 of the United States Code.

On March 31, 1988, the district court entered judgment permanently enjoining respondents "from refusing to allow husbands and wives to qualify as separate persons" for the purposes of the crop-program payment limitations. Appendix C, at 48a. The district court held that the one-person rule violated the APA's prohibitions on arbitrary and capricious agency action and action in excess of statutory authority. *Id.* at 43a-46a.[4] While fully acknowledging the limited scope of review and the

[4] In a holding that bolstered its APA ruling, the district court also invalidated the one-person rule under the Fifth Amendment, finding that it was an improper marriage-based classification. *Id.* at 43a. The district court expressly reserved the question of whether the rule was also unconstitutional on account of gender-based discrimination. *Id.*

deference ordinarily due an agency's decision, the district court ultimately concluded that, by categorically barring married couples from qualifying for separate crop payments, the one-person rule was "not consistent with the agency's statutory mandate to interpret the term 'person' fairly and reasonably in accordance with the congressional mandate to encourage participation in the farm crop subsidy program." *Id.* at 46a.

Relying on this Court's clear precedent, the district court also criticized the agency's decisionmaking process, specifically "its failure to 'cogently explain why it has exercised its discretion in a given matter.'" *Id.* at 45a (citing *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)). The district court pointed to respondents' failure to "submit[] any administrative record indicating what deliberations prompted the Secretary to promulgate the husband-wife rule" and to the fact that, instead, the Secretary had only "offer[ed] the current rationalizations for the rule as well as a questionable estimate of the cost to the government if the rule were abolished" in 1988. Appendix C, at 45a. The court found these *post-hoc* rationalizations to be "entirely unpersuasive." *Id.*

On appeal, the D.C. Circuit reversed. Central to its rejection of petitioner's APA claim was the panel's formulation of the issue as being limited to whether the rule "is a legitimate interpretation of the statute." Appendix A, at 7a. In thus narrowly framing the question, the panel declined to conduct the usual inquiry, required by numerous decisions of this Court, to determine whether the agency's original decision was abritrary and capricious.

The panel openly acknowledged that its highly deferential review of the one-person rule would have "implications that go far beyond this case." *Id.* at 8a. It justified its relaxed standard of review by observing that promul-

gation of the one-person rule in 1970 was not subject to the procedural guidelines of Section 553, including its requirement of a contemporaneous explanation of proposed agency action. *Id.* The panel reasoned that in the absence of such procedural requirements under Section 553, it could not find reliable enough indications of the agency's reasoning to carry out the arbitrary-and-capricious review standard of Section 706(2)(A). Appendix A, at 9a-10a.

This premise led the lower court to conclude that it could rely on agency defenses not ordinarily deemed permissible in such review proceedings. In particular, the lower court held that it could freely rely on the *post-hoc* rationalizations and explanations offered by the agency's litigation counsel, which attempted to justify the rule on the basis of current notions of administrative ease and economy. *Id.* at 9a-13a, 15a-17a. On the basis of these and related considerations, the panel rejected petitioner's APA challenge.

## REASONS FOR GRANTING THE PETITION

Without a shred of support from the text of the Administrative Procedure Act or the rulings of this Court, the lower court has created a new and highly deferential standard for reviewing the validity of numerous categories of agency action that are not subject to the contemporaneous explanation requirement of the APA. In creating this unprecedented lower-tier standard of review —which eliminates any real inquiry into the reasonableness of an agency's decisionmaking process and permits primary reliance on *post-hoc* rationalizations of agency counsel—the panel below has defied explicit rulings of this Court and has ignored clear holdings in its own and several other circuits. The relaxed standard of appellate review created below, if left uncorrected, would encourage agencies to avoid this Court's requirements for reasoned and responsible administrative decisionmaking and would

insulate important categories of agency action from meaningful judicial review. Accordingly, and also in light of the archaic and irrational nature of the agency rule under consideration, a writ of certiorari should issue.

## I. THE APPELLATE COURT'S REFUSAL TO EXAMINE THE REASONABLENESS OF AGENCY DECISIONMAKING IN THE COURSE OF ARBITRARY-AND-CAPRICIOUS REVIEW VIOLATES THIS COURT'S UNAMBIGUOUS PRECEDENTS AND CLASHES WITH THE HOLDINGS OF OTHER CIRCUIT COURTS.

Frankly conceding that its ruling "has implications that go far beyond this case," Appendix A, at 8a, the panel below sustained the challenged regulation notwithstanding the absence of any evidence shedding light on the agency's original decision. Rather than addressing the Secretary's actual decisionmaking process or requiring the submission of evidence relating to that process, the court merely sought to satisfy itself that the one-person rule was "a legitimate interpretation of the statute." *Id.* at 7a. In thus abdicating its obligation to undertake a searching analysis of whether the agency engaged in reasoned decisionmaking, the panel ignored plain rulings of this Court and created a sharp conflict with numerous other circuits.

The pretext seized upon by the lower court to justify this new, relaxed standard was the fact that the agency's 1970 rulemaking was exempt from the APA's contemporaneous explanation requirement set forth in Section 553(b), 5 U.S.C. § 553(b). While the panel conceded that "an exemption from [S]ection 553 does not insulate a rule from substantive judicial review" under the arbitrary-and-capricious standard of Section 706, Appendix A, at 8a, it did not insist on an explanation for the rule grounded in the realities of 1970. In so ruling, the panel thus refused to consider—as Section 706 plainly requires—whether the rule was the product of reasoned decisionmaking and instead merely focused on whether the rule

was, in hindsight, "a legitimate interpretation of the statute." Appendix A, at 7a. Such an approach is in conflict with the explicit commands of this Court and numerous circuit courts, both in cases generally articulating the appropriate standard of review under Section 706 and in cases where the agency action being reviewed under Section 706 was exempt from particular APA procedural requirements, such as those of Section 553.

The standard for review of agency action under Section 706 is clear. This Court has unambiguously required that, in determining whether agency action is arbitrary and capricious, a reviewing court must determine

> "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

*Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Only through such review can the court determine whether the agency's "decision was based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). This Court's decisions thus *require* reviewing courts to engage in a "searching and careful" inquiry, *id.*, so that they can determine whether the agency's result was "the product of reasoned decisionmaking," *Motor Vehicle*, 463 U.S. at 52.[5]

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[5] *See also Mobil Oil Corp.* v. *Department of Energy*, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979) ("The standard of review of agency action alleged to be arbitrary and capricious is not simply whether there exists a rational basis for the action. Rather . . . the inquiry is 'whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body.' "), *cert. denied*, 446 U.S. 937 (1980); *accord Kennecott* v. *EPA*, 780 F.2d 445, 449 (4th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986); *United States* v. *Garner*,

These requirements are no less applicable in situations where the agency is exempt from the provisions of Section 553. *Overton Park* itself involved judicial review of action not subject to APA procedural requirements, in that instance an informal adjudication by the Secretary of Transportation. Yet the Court remanded to the district court with instructions that it determine the actual basis for the Secretary's action. 401 U.S. at 420.

The irrelevance of procedural requirements to the purpose of arbitrary-and-capricious review was reconfirmed in *Camp* v. *Pitts*, 411 U.S. 138 (1973) (per curiam), where the Court established procedures to be used by reviewing courts when an agency has not said enough to "provide an adequate basis for judicial review." *Id.* at 138. This Court held that the objective of a reviewing court must nevertheless be to apply Section 706's requirements, not some lesser standard, to "the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* at 142. Even where the agency action is exempt from procedural requirements such as those of Section 553, the focus during judicial review must include the reasonableness of the decisionmaking process and not simply the rationality of the agency's final action.

The Fifth Circuit, in a recent decision directly in conflict with that below, explicity held that judicial review of rulemaking exempt from Section 553 still must encompass the reasonableness of the agency's decisionmaking process. *United States* v. *Garner*, 767 F.2d 104, 118 (5th Cir. 1985). The *Garner* court ruled that "even when the APA does not require the agency to incorporate in the rule a general concise statement of its basis and purpose, the agency's failure to demonstrate that the rule is the product of reasoned decisionmaking renders it

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767 F.2d 104, 116 (5th Cir. 1985); *International Bhd. of Teamsters* v. *United States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984); *ILGWU* v. *Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983).

invalid under the arbitrary and capricious standard." *Id.* (citing *Overton Park*, 401 U.S. at 419-20).[6]

The express terms of the APA, repeatedly reinforced by this Court, required the lower court here to scrutinize the actual process by which the Secretary decided in 1970 to adopt the one-person rule. The panel below utterly failed to perform that inquiry. Especially in light of the 18-day gap between passage of the statute and issuance of the rule, the Secretary's unexplained abandonment of the agency's prior treatment of married farm couples, and the potentially suspect nature of marital classifications, the court should have seen the need for a particularly aggressive inquiry into the basis for the original decision. Instead, the panel undertook a narrow substantive review of the agency's policy choice, weighing only whether the choice was permissible and relying almost exclusively on a highly suspect interpretation of Congressional intent.

Rather than demand a factual reckoning by the agency of its 1970 deliberations,[7] the panel below resorted to free-wheeling and unseemly speculation about those deliberations. Noting that the agency's 1970 regulations bear a "strong resemblance" to the draft regulations that accompanied the Conte-Findley Amendment, the panel "imputed to the Secretary" and to Congress as a whole the anti-evasion concerns expressed during the floor debate

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[6] While *Garner* was—as its citation to *Overton Park* reveals and as the holding of this Court in *Camp* v. *Pitts* confirms—correctly decided, the panel's ruling below, together with similar holdings in two other circuits, *see Bedford County Gen. Hosp.* v. *Heckler*, 757 F.2d 87, 90-91 (6th Cir. 1985); *Holy Cross Hosp.-Mission Hills* v. *Heckler*, 749 F.2d 1340, 1346 (9th Cir. 1984), has exacerbated a stark conflict among the circuits on this precise point.

[7] Respondents have never established that they are unable to provide any witnesses and documents bearing on the 1970 decision-making process.

of that rejected amendment. Appendix A, at 13a, 18a-19a. The obvious problem with this imputation is that the 1970 legislative history reveals a lack of concern about evasion, as particularly evidenced by the decisive defeat of the Conte-Findley Amendment. In imputing the Conte-Findley concerns to the Secretary and to Congress as a whole, the panel ignored the well-established rule that the rejection of an amendment is, if anything, strong evidence that Congress *did not intend* the result sought by the sponsors of the amendment. *See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 198-99 (1913); 2A N. Singer, *Statutes and Statutory Construction* § 48.18 (4th ed. 1984); Willard & MacDonald, *The Effect of an Unsuccessful Attempt to Amend a Statute*, 44 Cornell L.Q. 336, 341-43 (1958) (citing numerous cases).[8] In any case, Section 706 of the APA required the Secretary to engage in a reasoned decisionmaking process and to consider the options available to him, not blindly to accept the suggestion of Congressmen who failed to convert their colleagues.

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[8] In a textbook example of why resort to legislative history is increasingly subject to criticism, the panel below speculated that the reason for the amendment's defeat was not because of its anti-evasion language. Appendix A, at 18a-19a. Such guesswork is of course entirely inappropriate. Moreover, the panel's guess was surely wrong, inasmuch as it ignored Representative Conte's own admission that the anti-evasion provision in his amendment was its "most important feature." 116 Cong. Rec. 27,141 (1970). This Court and lower courts should not abide the efforts of a legislator on the losing side, in Representative Conte's own words, "to establish a legislative history." *Id.*

Reliance on a defeated floor amendment was not the panel's only misuse of legislative history. Its attempts to suggest that Congress subsequently ratified the one-person rule are flatly contrary to the evidence, which in fact points in the other direction. *See* pages 4 to 5, above.

This Court has never withdrawn its requirement that the arbitrary-and-capricious standard requires reviewing courts to conduct a searching evaluation of agency decisionmaking. Only such an evaluation can satisfy the requirements of Section 706. The relaxed standard the panel below created for agency conduct exempt from the contemporaneous-explanation requirement of Section 553 is not authorized by the APA and conflicts with decisions of this Court and the circuit courts. A writ should issue to eliminate the conflict created by the panel's decision.

## II. THE APPELLATE COURT'S RELIANCE ON *POST-HOC* RATIONALIZATIONS OF COUNSEL SQUARELY CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

The court of appeals openly admitted that, in determining whether the Secretary's action met the panel's bare legitimacy test, it relied "on counsel's explanations" conceived and proffered almost twenty years after the agency acted. Appendix A, at 9a. By embracing lawyer's argument, the court jettisoned the previously unquestioned rule, repeatedly articulated in decisions of this Court and the circuit courts, that courts reviewing agency action cannot rely on *post-hoc* rationalizations as substitutes for the agency's own reasoning. This unprecedented departure largely foreclosed judicial assessment of the adequacy of the Secretary's original reasoning process and, if applied prospectively, would give agency counsel the opportunity to mask or distort the true reasons for agency action.

The court below acknowledged that this Court

> "has repeatedly insisted that at least when an agency had an obligation to explain its action contemporaneously with the action, *post-hoc* rationalizations of counsel may not be relied upon by a reviewing court."

*Id.* at 10a. Citing no authority, however, the court below then decided that the usual prohibition need not apply

where the agency was exempt from the explanation requirement. *Id.* To put the matter baldly, the court decided that where the agency's rationale must be resurrected after the fact anyway, the story concocted by the lawyers is as good as any other. *Id.* at 11a.[9]

The problem over which the court stumbled into error was not new or unique. The leading decision establishing the parameters of judicial review, *Overton Park*, was itself a case involving informal agency action exempt from APA requirements. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420-21 (1971). In that decision, however, the Court rejected reliance on " '*post hoc*' rationalizations" because they do not constitute the "administrative record that was before the Secretary at the time he made his decision." *Id.* at 419-20.[10]

Similarly, in *Camp* v. *Pitts*, 411 U.S. 138 (1973), the Court made clear that the absence of a contemporaneous explanation requirement does not open the door to the *post-hoc* explanations of "some new record made initially in the reviewing court." *Id.* at 142. If the record is silent, as here, the reviewing court should either remand to the agency or "obtain from the *agency*, either through affidavits or testimony, such additional explanation of the

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[9] Obviously, the reviewing court's task was made no easier in this case by the fact that the Secretary acted a scant 18 days after passage of the statute without any form of public notice, comment, or discussion. That barren record ought reasonably to have required *more* attention to the original decision, not less.

[10] The lower court's error may have been inadvertent, as indicated by this passage:

> "We are thus aware of no case in which the Supreme Court has applied *Chenery's* proscription against crediting counsel's explanations to the review of agency action exempt from the APA's requirement of a contemporaneous explanation of the action's basis or purpose."

Appendix A, at 11a (referring to *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)). *Overton Park*, cited by the panel, was such a case.

reasons for the agency decision as may prove necessary." *Id.* at 143 (emphasis added). *See also Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 337-38 (D.C. Cir. 1989).[11]

The instructions in *Camp* merely refine this Court's longstanding requirement that agency action be reviewed on the basis of what the agency did, not what the agency or its counsel later thinks that it might have done. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94-95 (1943). Even when agency action is exempt from APA requirements, a reviewing court cannot discharge its function of determining whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" by relying on subsequent rationalizations. *Overton Park*, 401 U.S. at 416, 420.[12] *Post-hoc* rationalizations by counsel have, of course, long been viewed as especially suspect. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962).

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[11] To be sure, an agency cannot be compelled by a reviewing court to adopt procedures inconsistent with those Congress has selected. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978). That does not mean, however, that the agency's decision ceases to be the focus of appellate review.

[12] The panel's error also may be attributable to its failure to respect all the objectives of the *Chenery* rule. The panel seems to have viewed *Chenery* as serving only one purpose: ensuring that the agency rather than the judiciary supplies the reasons for issuing a rule. Appendix A, at 12a. But *Chenery* serves another function as well, which is to require the courts to review the decisionmaking process of the agency, not the creativity of appellate counsel. As this Court emphasized in *Massachusetts Trustees of Eastern Gas & Fuel Assoc.* v. *United States*, 377 U.S. 235 (1964):

> "These [*Chenery*-type] cases are aimed at assuring that initial administrative determinations are made with relevant criteria in mind and in a proper procedural manner."

*Id.* at 248.

Decisions of other circuits and, indeed, other decisions of the D.C. Circuit have followed the Court's guidance, in sharp contrast to the panel decision. In *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), a case based on agency action exempt under Section 553(a), the court flatly rejected explanations offered by counsel, declaring that such explanations "are simply an inadequate basis for the exercise of substantive review of an administrative decision." *Id.* at 117. *See also Bradley* v. *Weinberger*, 483 F.2d 410, 414-15 (1st Cir. 1973) (rejecting *post-hoc* arguments not considered by agency). In prior decisions of the D.C. Circuit, neither mentioned nor expressly overruled in the opinion below, the court had reached the same conclusion. *See, e.g., Getty* v. *FSLIC*, 805 F.2d 1050, 1057 n.10 (D.C. Cir. 1986).

The D.C. Circuit had previously recognized, as *Camp* teaches, that an administrative record could be supplemented only to explore the *original* rationale for the decision, not to introduce "findings [that] might have been made." *Chenery*, 318 U.S. at 94. As the D.C. Circuit explained in *AT&T Information Sys., Inc.* v. *GSA*, 810 F.2d 1233 (D.C. Cir. 1987):

> "Although the record may be supplemented to provide, for example, background information or evidence of whether all relevant factors were examined by an agency, we have made clear that '*[t]he new material should be merely explanatory of the original record and should contain no new rationalizations.*'"

*Id.* at 1236 (citations omitted) (emphasis added). The court failed to abide by that restriction here.

The *post-hoc* rationalizations on which the decision rests plainly reveal that the court reviewed the 1989-vintage arguments of counsel and not the 1970-era reasoning of the Secretary. These arguments include a highly questionable estimate of the current cost of eliminating the one-person rule, which manifestly was not before the agency when the rule was adopted. Similarly,

counsel drew on the agency's experiences since 1970 with other more discriminating regulations—experiences unknown to the agency when the one-person rule was adopted.

With respect, the appellate court's attempts to bolster its reliance on counsel's representations border on frivolous. First, the panel suggested that the Department's attorneys might have better knowledge than anyone else concerning the original reasoning underlying the rule. Appendix A, at 11a. This assertion was especially remarkable, because the Department was not represented by agency counsel, but by the U.S. Attorney's Office. Although we have ample reason in this case to respect the abilities of our opposing counsel, there is no reason to believe that they have any more knowledge about the considerations underlying the 1970 regulation than do we or any other outsiders.[13] Second, the court relied again on the rejected Conte-Findley Amendment, which as we have shown (*see* pages 11 to 12, above) undercuts the one-person rule. Finally, the court indicated that passage of time may make reliance on counsel's representations more appropriate, but its concerns about the inadequacy of recollection of 1970 events were mere speculation.[14]

Counsel's after-the-fact arguments may or may not have paralleled the agency's reasoning in 1970. The Secretary's predecessor may have been convinced, as counsel now assert, that any alternative to the one-person rule

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[13] The fact that government lawyers may have made similar *post-hoc* arguments in *Martin* v. *Bergland*, 639 F.2d 647 (10th Cir. 1981), is of no consequence. Moreover, as the panel below conceded, that decision "involved only a constitutional challenge" to the one-person rule. Appendix A, at 12a n.4.

[14] The court despaired of seeking the views of the current Secretary, who was not in office in 1970. It ignored the possibilities, however, that the agency still employs key decisionmakers from 1970 or that "the administrative officials who participated in the decision [could] give testimony explaining their action." *Overton Park*, 401 U.S. at 420.

would have been impossible to apply; or he may instead have been burdened by improper preconceptions about women farmers that caused him to underestimate their ability to make significant and independent contributions to agricultural endeavors. The crucial defect in the approach taken below, however, is that it left the original decision unexplored and this and other uncertainties unresolved. It shifted the focus from "the administrative record already in existence" (*Camp*, 411 U.S. at 142) to counsel's ingenuity during litigation. The court therefore abdicated meaningful judicial review of the agency's original decision.

Because the appellate panel's decision disobeyed clear directives from this Court and conflicts not only with decisions of other circuits but also with other decisions of the D.C. Circuit, a writ should issue.

## III. THE APPELLATE COURT'S FAILURE TO RECOGNIZE THAT LEGAL RULES CONCLUSIVELY TREATING A HUSBAND AND WIFE AS "ONE PERSON" ARE INHERENTLY IRRATIONAL IS INCONSISTENT WITH THIS COURT'S PRECEDENT.

The lower court was not troubled by the potential for unfairness and indeed the irrationality of the one-person rule, which creates an automatic and irrebutable presumption that a husband and wife are "one person." No other category of related natural persons—siblings, parents and minor children, unmarried couples living together, and financially interdependent partners—is singled out for similar treatment by the regulations. Given the total absence of any support for such a categorical rule in the legislative history, its patent unfairness, and the presence of alternative approaches, the one-person rule is arbitrary and capricious.

The one modern case of this Court of which we are aware that analyzes a legal rule treating a husband and wife as one person buttresses this conclusion. In *United*

*States* v. *Dege*, 364 U.S. 51 (1960), the Court invalidated such a rule in the context of husband-wife conspiracies. Justice Frankfurter, having reviewed the sexist common-law background of marital presumptions, wrote for the Court that such rules reflect "medieval views," "enthrone an unreality into a rule of law," are "unnourished by sense," are "offensive to the ethos of our society," and recall "self-deluding romanticism." 364 U.S. at 52-54.[15]

In sum, the one-person rule is irrational and, by any measure, both arbitrary and capricious.

## CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ should issue granting review of the questions presented.

Respectfully submitted,

J. MICHAEL HEMMER
MITCHELL F. DOLIN *
JENNIFER S. DIVINE
DEBORA L. OSGOOD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
*Attorneys for Petitioner*

August 1989

* Counsel of Record

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[15] *See also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("[T]he marital couple is . . . an association of two individuals with a separate intellectual and emotional makeup."); *Commonwealth* v. *Lawson*, 309 A.2d 391, 396 (Pa. 1973) ("There is no reason to perpetuate the fiction that husband and wife are one person with one will in the eyes of the law. They are not."); *Richard* v. *Richard*, 300 A.2d 637, 641 (Vt. 1973) (We "reject the archaic principle that husband and wife are 'one person.' ").

89-366

No. 89-

Supreme Court, U.S.
FILED
AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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WOMEN INVOLVED IN FARM ECONOMICS,
*Petitioner,*

v.

CLAYTON YEUTTER, SECRETARY OF AGRICULTURE,
AND UNITED STATES DEPARTMENT OF AGRICULTURE,
*Respondents.*

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## APPENDIX TO PETITION FOR A WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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J. MICHAEL HEMMER
MITCHELL F. DOLIN *
JENNIFER S. DIVINE
DEBORA L. OSGOOD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
*Attorneys for Petitioner*

* Counsel of Record

August 1989

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued February 7, 1989 Decided June 2, 1989

No. 88-5192

WOMEN INVOLVED IN FARM ECONOMICS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
*Appellants*

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Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-01752)

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*John Facciola*, Assistant United States Attorney, with whom *Jay B. Stephens*, United States Attorney, *John D. Bates*, *R. Craig Lawrence* and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief, for appellants.

*Mitchell F. Dolin*, with whom *J. Michael Hemmer* was on the brief, for appellee.

Before: RUTH B. GINSBURG, SILBERMAN and BUCKLEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Nearly two decades ago, Congress enacted a per-person limitation on certain payments made to producers under the Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949, as amended, 7 U.S.C. §§ 1281-1469 (1982 & Supp. V 1987). *See* Agricultural Act of 1970, § 101(1), 84 Stat. 1358, 1358 (1970). In the original payment limitation bill and in subsequent reenactments, Congress delegated to the Secretary of Agriculture the task of promulgating regulations defining the term "person." *See, e.g., id.* § 101(4), 84 Stat. at 1359; 7 U.S.C. § 1308(5) (Supp. V 1987). Those regulations, following closely on the heels of the 1970 Act, provided, *inter alia*, that husbands and wives would be treated as one person for purposes of the payment limitation. 35 Fed. Reg. 19,339, 19,340 (1970). This irrebuttable "husband-wife rule" governed farm support payments through the 1988 crop year. *See* 7 C.F.R. § 795.11 (1988) (version of regulation in effect for 1988 crop year).

Women Involved in Farm Economics ("WIFE"), representing a "national membership of women involved in farming and agriculture," filed this action challenging the husband-wife rule as violative of both the Administrative Procedure Act and the Fifth Amendment. The district court found merit in both objections, and entered an order permanently enjoining the Agriculture Department from enforcing the husband-wife regulation. *WIFE v. Dep't of Agriculture*, 682 F. Supp. 599, 608 (D.D.C. 1988). We reverse.

I.

Through a variety of complex economic incentives—price and income supports and acreage controls among them—Congress has attempted to stabilize crop production, commodity prices, and farm income in a market that Congress believed would be subject to volatile swings in supply and price if left unregulated. In 1970, reacting to harsh public criticism of the large sums of money

received by farmers through agricultural support programs, Congress reauthorized these mechanisms but, for the first time, imposed a per-person limitation on payments from certain farm support programs. *See* Agricultural Act of 1970, § 101(1), 84 Stat. at 1358. Originally pegged at $55,000, *id.*, the payment limitation has fluctuated in the course of periodic congressional reviews of farm support programs; the payment limitation in effect when this case was brought—governing payments for the 1988 crop year—stood at $50,000. *See* 7 U.S.C. § 1308(1) (Supp. V 1987).[1]

The 1970 statute, as noted, required the Secretary to "issue regulations defining the term 'person' and [also to prescribe] such rules as he determine[d] necessary to assure a fair and reasonable application of [the payment] limitation." Agricultural Act of 1970, § 101(4), 84 Stat. at 1359; *see* 7 U.S.C. § 1308(5) (Supp. V 1987). A scant three weeks after receiving this mandate, the Secretary issued regulations implementing the Act generally and defining the term "person" for purposes of administering the payment cap. *See* 35 Fed. Reg. 19,339 (1970). The regulations provided that

> the term "person" shall mean an individual, joint stock company, corporation, association, trust, estate, or other legal entity. In order to be considered a separate person for the purpose of the payment

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[1] For each of the 1987 through 1990 crops, the total amount of deficiency payments . . . and land diversion payments that a person shall be entitled to receive under one or more of the annual programs established under the Agricultural Act of 1949 (7 U.S.C. § 1421 *et. seq.*) for wheat, feed grains, upland cotton, extra long staple cotton, and rice may not exceed $50,000.

7 U.S.C. § 1308(1) (Supp. V 1987). Deficiency payments ensure that farmers are able to recover an established target price for certain crops, while diversion payments are made to induce farmers not to grow certain supply-sensitive crops.

limitation, in addition to the other conditions of this part, the individual or other legal entity must

(a) Have a separate and distinct interest in the land or crop involved,

(b) Exercise separate responsibility for such interest, and

(c) Be responsible for the cost of farming related to such interest from a fund or account separate from that of any other individual or entity.

35 Fed. Reg. at 19,340; *see* 7 C.F.R. § 795.3(b) (1988). Individual partners forming a partnership or joint venture, or a corporation and its separate stockholders, could therefore qualify for treatment as separate persons provided they satisfied the separate interest and responsibility criteria specified in the regulation. *See id.* But the regulation deemed a husband and wife to be one person regardless of their separate interests and responsibilities. *See* 35 Fed. Reg. at 19,340; 7 C.F.R. § 795.11 (1988). As a corollary, related regulations provided that any minor children in the marital houshold would not ordinarily be able to qualify as separate persons. *See* 35 Fed. Reg. at 19,340; 7 C.F.R. § 795.12 (1988).[2] These regulations remained in effect without material alteration through the institution of this lawsuit. *See* 7 C.F.R.

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[2] The regulations then permitted (and presently allow) a minor child, in narrow circumstances, to qualify as a separate person if he owns and operates a farm without the collaboration of his parents. In order to qualify, though, the minor must either (1) be "represented by a court-appointed guardian who is required by law to make a separate accounting for the minor[, provided] ownership of the farm is vested in the minor," 7 C.F.R. § 795.12(a)(1) (1988); (2) "establish[] and maintain[] a different household from his parents or guardian and personally carr[y] out the actual farming operations for which there is a separate accounting," *id.* § 795.12(a)(2); or (3) possess "a farming operation resulting from his being the beneficiary of an irrevocable trust[, provided] ownership of the property is vested in the trust or the minor." *Id.* § 795.12(a)(3).

§§ 795.3, 795.11, 795.12 (1988). In late 1987, Congress codified the husband-wife rule in most of its applications, but directed that the Secretary of Agriculture modify the rule to provide that

> [for] any married couple consisting of spouses who, prior to their marriage, were separately engaged in unrelated farming operations, each spouse shall be treated as a separate person with respect to the farming operation brought into the marriage by such spouse so long as such operation remains as a separate farming operation, for the purposes of the application of the limitations under this section.

Pub. L. 100-203, § 1303(a)(2), 101 Stat. 1330, 1330-16 (1987). The regulations stemming from Congress' 1987 amendments, which have since been published by the Secretary, *see* 53 Fed. Reg. 29,552, 29,576 (1988) (to be codified at 7 C.F.R. § 1497.19), were not challenged in this case.

WIFE brought this action challenging the original regulation on administrative law, equal protection, and due process grounds. The district court granted WIFE's motion for summary judgment, holding that the regulation was irrational and thus unconstitutional. Although the court acknowledged that strict scrutiny was inappropriate because the regulation did not "directly and substantially interfere[]" with the fundamental right to marry, 682 F. Supp. at 601 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978)), the court nevertheless believed the regulation unrelated to any legitimate governmental interest considered by Congress when it enacted the farm support programs. Congress' interests in establishing a limitation on payments to farmers, according to the court, were limited to encouraging maximum participation in agricultural stabilization efforts and "to insur[ing] that the crop subsidy program [was] fairly and reasonably applied." *Id.* at 604. The court thought the regulation

fundamentally at odds with these legitimate concerns because it both discouraged participation and resulted in an unfair allocation of crop subsidies.

The Government's argument that the economic efficiencies of the marital household justified the regulation was rejected by the court with the observation that "the Secretary has seen fit to not make such stereotypical assumptions with regard to other economically dependent entities" by allowing members of partnerships and the like to qualify separately. *Id.* at 605. The court also rebuffed the government's explanation that the regulation prevented married couples from evading the payment limitation, or at least enabled the Secretary to avoid the administrative burden of distinguishing between legitimate and illegitimate claims by married persons seeking separate payments. The Secretary offered no reason for singling out married couples as potential sources of evasion, nor did he offer, according to the court, an adequate explanation as to why the program's eligibility criteria—used for ordinary partnerships—could not be employed to analyze claims filed by married farmers. *Id.* Finally, the district judge seemed persuaded that wealthy farm couples could circumvent the husband-wife rule by creating corporations that would qualify as independent "persons" under the regulations, foisting "the burden of the rule[] on those farmers least financially capable of maintaining their farms without it." *Id.* at 606. This, said the court, was precisely the indicium of irrationality the Supreme Court found troubling when it struck down the food stamp program's restrictive definition of "household" in *Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973). *See WIFE*, 682 F. Supp. at 606.

The district court's view of Congress' purpose in enacting the 1970 payment limitation led it to conclude the Secretary's rule was inconsistent with the statute as well, despite the fact that the rule survived nearly 20

years without congressional protest. Congress directed a "fair and reasonable" interpretation of the term "person" "to *encourage* participation in the farm crop subsidy program," *id.* at 607 (emphasis added), and because the husband-wife rule discouraged participation, the district court determined the regulation to be based on an impermissible construction of the statute.[3]

II.

A.

We look first to appellee's claim that the regulation is not authorized by the statute. *See, e.g., Jean v. Nelson*, 472 U.S. 846, 857 (1985) (federal courts are obliged "to avoid constitutional adjudication except where necessary"). That question, of course, turns on whether the Secretary's definition of person—which includes the husband-wife rule—is a legitimate interpretation of the statute. The district court expressed concern over the failure of the Secretary to produce either a *contemporaneous* administrative record of the deliberations that preceded publication of the husband-wife rule in 1970, or a *contemporaneous* statement of the rule's central rationale, so as to aid the court in evaluating the Secretary's statutory interpretation. The court observed that "[i]n the absence of a record explaining the agency's reasoning behind promulgating the regulation, it is difficult to discern its rationality." *WIFE*, 682 F. Supp. at 607. The *post-hoc* "rationalizations" of the Secretary (offered by counsel) were thought inadequate. *See id.* (citing *Motor*

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[3] The injunction entered below affected crop subsidy payments only for the 1988 crop year; as we have noted, *see supra* p. 5, for crop years 1989 and beyond, Congress codified a modified version of the husband-wife rule into law. While the Secretary has already made payments for 1988 under the terms of the district court's injunction, we were told at oral argument that he has contractually reserved the right to recover "excess" sums if the Department is successful in this appeal. We thus are presented with a live case.

*Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). We are less troubled by this alleged shortcoming, however, and believe that, in the unusual circumstances in which this challenge arises, the representations of counsel may at least be given some weight in our inquiry into the rule's consistency with the statute.

We think it useful to sketch the legal environment in which the Secretary first implemented the payment limitation in 1970, for it illustrates that the question we must resolve has implications that go far beyond this case. The husband-wife rule was promulgated in 1970 under an explicit exception to the Administrative Procedure Act's requirement that published rules be accompanied by a "concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1982). Because the rule concerned "a matter relating to . . . public . . . benefits," *id.* § 553(a)(2), none of the procedural requirements of section 553 was applicable. It was only *after* publication of the challenged regulations that the Department of Agriculture voluntarily disavowed section 553's exception, *see* 36 Fed. Reg. 13,804 (1971), agreeing for the future to comply with notice and comment requirements. At the time the regulation was first promulgated, however, the Secretary complied with all relevant procedural requirements of the Administrative Procedure Act. Were "the issue [solely] one of compliance with the procedural requirements of the APA, rather than with the substantive mandate of [the] enabling legislation," inquiry into the husband-wife rule's statutory validity would end here. *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1060 (5th Cir. 1985).

Of course, an exemption from section 553 does not insulate a rule from substantive judicial review, *see* 5 U.S.C. §§ 701, 706 (1982), and we recognize that *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), requires agencies to generate an administrative

record after litigation commences to facilitate such substantive review irrespective of whether sections 553 or 554 of the Administrative Procedure Act required a record (or a contemporaneous statement) prior to effecting the challenged action. *Id.* But to require a *contemporaneous* explanation for the rule when the APA specifically exempted the agency from an obligaiton to provide it is not open to a reviewing court. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Holy Cross Hosp.-Mission Hills v. Heckler*, 749 F.2d 1340, 1346 (9th Cir. 1984); *St. Joseph Hosp. v. Heckler*, 570 F. Supp. 434, 437-40 (N.D.Ind. 1983).

The district court has some leeway in determining the scope of an adequate record to permit review of informal agency action or, as in this case, a regulation properly issued without a statement of its basis and purpose. *See Occidental Petroleum Corp. v. SEC*, No. 87-5279, slip op. at 22, 24-25 (D.C. Cir. April 21, 1989). If, for instance, the district court had demanded an affidavit from the Secretary to assure the court that all of counsel's explanations for the adoption of the rule in 1970 were authorized by the present Secretary, we assume *arguendo* that the court would not have abused its powers. The district court actually did so with respect to the Department's claim that the cost to the government of abolishing the husband-wife rule would be substantial. Paradoxically, despite its concern, the district court did not ask for any further Departmental affirmation of counsel's explanations. Instead, as we read the court's opinion, it actually assumed that counsel's explanations accurately represented the Department's view of the reasons for adopting the rule in 1970. We think that the district court was, as are we, entitled to rely on counsel's explanations without seeking a supporting affidavit from the Secretary.

To be sure, *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), ordinarily prevents agency counsel from proffer-

ing alternative theories—not explicitly embraced by a department or agency head—to support a challenged regulation; to permit that risks *judicial* "intru[sion] upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.* By adopting a specific argument in support of agency action offered by counsel in the litigating process—but not relied on by the agency—the courts might actually restrict improperly the agency's future freedom of action to make policy under a paritcular statute. And in the swirl of litigation it is sometimes not entirely clear whether an argument that appeals to a court has actually presented in quite the fashion the court perceives. Thus, the Supreme Court has repeatedly insisted that at least when an agency had an obligation to explain its action contemporaneously with the action, *post-hoc* rationalizations of counsel may not be relied upon by a reviewing court. *See, e.g., Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

But, if an agency had no obligation to explain its actions contemporaneously, somewhat different considerations apply. In these circumstances, the entire record, or a good part of it, is actually created for the sole purpose of judicial review; by definition, much that is presented to the court is developed *post-hoc*. Typically, any challenges to the agency's action will follow soon after the action is taken so the explanation given to the court can be presented by those agency officials who directed the agency action. A court may well determine that the representations of counsel require buttressing by affidavits submitted by the officials who took the action, *see Overton Park*, 401 U.S. 420; however, when a court does so it acts out of somewhat different concerns than those that underline *Chenery*. Typically, when an agency is entitled to act without expressing its reasons it is not engaged in a law/policymaking function. There is therefore little risk that a reviewing court, by accepting coun-

sel's *post hoc* explanations, will encroach upon that role. In this setting the court is primarily concerned that, insofar as it is practicable, the actual reasons for the agency's action—presumably best expressed by the agency head—be bared for judicial scrutiny to determine whether the agency acted with an unlawful motive. We are thus aware of no case in which the Supreme Court has applied *Chenery*'s proscription against crediting counsel's explanations to the review of agency action exempt from the APA's requirement of a contemporaneous explanation of the action's basis or purpose. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (rulemaking subject to notice and comment procedures); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 537 (1981) (rulemaking for which 29 U.S.C. § 655(e) required statement of reasons); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 685 n.22 (1980) (formal adjudication); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971) (rulemaking conducted under notice and comment procedures); *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (formal adjudication); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965) (same); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 & n.15 (1962) (same); *cf. Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 473-74 (1988) (declining to give *Chevron* deference to "agency litigation positions" in review of notice and comment rulemaking).

Where—as here—the basis for a regulation issued nearly twenty years ago is brought into question, the agency's principal litigation task is essentially historical. It is possible, perhaps likely, that no one presently in the agency has any better knowledge of the exact reasons that underlay the adoption of the rule than agency counsel. No matter who chronicles the rule's near-ancient history for the reviewing court, it is difficult to characterize the agency's role in defending the regulation as the kind of administrative policymaking that prompted the

Court's concerns in *Chenery*. Under these circumstances, requiring an affidavit from the present Secretary would add little to counsel's representations. Relying on the latter does not appear to offend the core consideration that supports *Chenery*—that the *agency* rather than the *judiciary* supply the reasons for issuing a rule so as not to interfere with the agency's future deliberations—nor does it carry a particular risk that the real reasons for agency action will escape judicial scrutiny altogether. *Compare Church of Scientology of Calif. v. IRS*, 792 F.2d 153, 162-63 n.4 (D.C. Cir. 1986) (en banc), *aff'd*, 108 S. Ct. 271 (1987), *with id.* at 165-66 (Silberman, J., concurring). And it should be noted that if the district court were obliged in this case to demand an affidavit from the incumbent Secretary, the same obligation would attach whenever a federal court is presented with a challenge to a regulation properly issued without explanation, no matter how old—including regulations issued prior to passage of the APA.

In any event, there are special indicia of reliability that accompany counsel's statements in the case before us. The Secretary's position—though first announced in litigation—has been consistent; it was advanced before in the Tenth Circuit eight years ago. *See Martin v. Bergland*, 639 F.2d 647, 650-51 (1981).[4] Perhaps even more telling, the rule under review, and the regulations of which it forms a part, bear a strong resemblance to draft regulations published by Representatives Conte and Findley in the course of offering an amendment to the 1970 Act. *Compare* 116 Cong. Rec. 27,141, 27,141-42 (1970) (Conte-Findley draft regulations) with 35 Fed. Reg. 19,339, 19,339-41 (1970) (Secretary's original regulations). Congressional concerns expressed during debate on the Conte-Findley amendment (including the

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[4] While *Martin* involved only a constitutional challenge to the husband-wife rule, the rationale advanced by the Secretary in support of the rule was identical to that offered here. *See Martin*, 639 F.2d at 651.

draft regulations)—which focused on the need to prevent evasion of the payment limitation—can, we think, be imputed to the Secretary. Those concerns further suggest that the challenged regulation comports with *Congress'* vision as well as the administrator's. *Cf. Schweiker v. Gray Panthers*, 453 U.S. 34, 50 n.22 (1981) (where "Congress itself [has] considered the 'relevant factors,'" *Overton Park* does not require parallel consideration by administrator). The husband-wife rule, we note, survived 17 years without congressional criticism, even though Congress revisited the authorizing statute four times during that period. *See* Pub. L. 99-198, § 1001 (5)(A), 99 Stat. 1445 (1985); Pub. L. 97-98, § 1101(5), 95 Stat. 1263 (1981); Pub. L. 95-113, § 101(4), 91 Stat. 918 (1977); Pub. L. 93-86, § 101(4), 87 Stat. 221-22 (1973). And since Congress has now (in 1987) codified the Secretary's regulation with only a modest modification for future years, it would appear excessively formalistic to remand for an explanation of the 1970 rule—an explanation that would surely track recent as well as the original congressional concerns—in order to judge the rule's legality as applied to the 1988 crop year.

B.

Once it is recognized, as appellees concede, that the word "person" as used in the statute was never intended to have its ordinary meaning, it seems rather obvious that the word is not self-defining. We are therefore puzzled by the district court's recourse to the "plain meaning" of the word person to support its rejection of the husband-wife rule. *WIFE*, 682 F. Supp. at 605. Congress explicitly authorized the Secretary to define the term "person." *See* Agricultural Act of 1970, § 101(4), 84 Stat. at 1359; 7 U.S.C. § 1308(5) (Supp. V 1987). That provision necessarily suggests that Congress did *not* intend the word to be applied in its plain meaning sense. In this sort of case, there is no need to rely on the presumptive delegation to agencies of authority to define

ambiguous or imprecise terms we apply under the *Chevron* doctrine, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984), for the delegation of interpretative authority is express. *See, e.g., United States v. Morton*, 467 U.S. 822, 834 (1984).

WIFE does not quarrel with the core premise of the Secretary's regulation—that two or more individuals engaged in a common economic enterprise are not *per se* entitled to separate person status for purposes of the payment limitation—nor does WIFE challenge the regulation's requirement that individuals, in order to qualify for separate "personhood", must demonstrate separate economic and legal interests in an enterprise, as well as the exercise of separate responsibility and the making of separate contributions to the cost of operating the enterprise from separate accounts. *See* 7 C.F.R. § 795.3(b)(1) (1988). What appellee disputes, instead, is the rationality of presuming irrebuttably that husbands and wives collaborating in one or more farm enterprises (together with their minor children) cannot make the showing of "separateness" the Secretary requires. The Secretary makes no such presumption with respect to other economic associations of individuals, such as joint ventures, partnerships, and households composed of unmarried family members, *see id.* §§ 795.7 & 795.8 and appellee asserts that the crop subsidy statute may not be construed to permit nuclear families to be singled out for such unfavorable treatment. Accepting appellee's vision of fairness rather than the Secretary's, the district court concluded that "the policy of completely barring married couples from qualifying for two payments operates against . . . insuring that [the crop subsidy program] is implemented fairly." *WIFE*, 682 F. Supp. at 606.

A husband and wife, of course, form an interdependent unit in society quite apart from those circumstances where they are engaged in joint production on a family farm, or in other economic joint ventures, and this is

not typically true of a corporation or partnership. The closeness of the family relationship makes it particularly difficult for the Secretary to analyze it as he would a solely economic enterprise in order to determine the existence of separate economic contributions. Even were the Secretary able to identify (without incurring a vexing and awkward administrative burden) the separate economic contributions each spouse makes to the operation of the family farm, typically the husband and wife and minor children form a common consumption unit. As our sister circuit said in rejecting a constitutional challenge to the same regulation, no matter how separately a husband and wife administer putatively independent farms, it cannot be denied that "each spouse benefits from the prosperity of the other." *Martin*, 639 F.2d at 651.

On that basis the Secretary, reasonably in our view, concluded that Congress, concerned about the public outcry against what were perceived as excessive crop subsidy payments, authorized him to treat husbands and wives as the same person. Since the husband and wife working together on a family farm typically enjoy certain unique efficiencies, perhaps on the production side but certainly on the consumption side, it would rationally be seen as unfair routinely to provide separate payments to both. (Even though the precise figure was hotly debated below, the cost of repealing the husband-wife rule (in terms of additional entitlements) was also at least relevant to the Secretary's decision to treat the husband and wife as one.)

Even if these efficiencies, in fact, are present in the ordinary marital household, appellee contends that it is arbitrary and unreasonable not to permit spouses to demonstrate the sort of economic separateness—which may occasionally exist—that would justify double payments. As the Secretary concedes, there may well be the occasional family farm where husband and wives independ-

ently produce and independently consume the fruits of their respective labors. We are told, however, that it is exceedingly difficult, if not impossible, to draw an exception for the unusual husband and wife that maintain economic independence without enabling every farm couple to qualify. Under the eligibility criteria in 7 C.F.R. § 795.3 that apply to partnerships, for example, the Secretary asserts that the typical farm spouse could easily establish a separate contribution of labor (if nothing else) to the farm enterprise; beyond that, all that would be required for the typical couple to establish "separateness" under the existing regulations would be some documentary proof of separate spousal legal interests in the farm and separate bookkeeping for the husband and wife —proof that would be rather easy to muster in the ordinary case. While the Secretary admits that it might be possible to draft more discriminating standards to cabin such an exception, he argues that the administrative burden attending application of such standards would inevitably be heavy. We think this administrative concern was something the Secretary could account for in choosing marital status as a proxy for economic interdependence. *See Drummond Coal Co. v. Hodel*, 796 F.2d 503, 507 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987); *cf. Parsons v. County of Del Norte*, 728 F.2d 1234, 1238 (9th Cir. 1984) (sustaining against equal protection challenge anti-nepotism statute extending only to immediate family members and not to unmarried cohabitants), *cert. denied*, 469 U.S. 846 (1984).[5]

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[5] Unlike appellee, we do not believe that the Secretary's determination to permit minor children, in narrow circumstances, to demonstrate an entitlement to separate payments, *see supra* n.2, obliges him to allow husbands and wives to make a showing showing. The "minor child" exceptions appear to us to be addressed largely to rare circumstances in which a minor is substantially emancipated from the parents' household, economically if not legally, *see* 7 C.F.R. § 795.12(a) (1988), and the factual showing required of the minor in each instance is not something that is capable of ready fabrication. To permit married couples to qualify similarly—for

Essentially the Secretary had three options: the first was to allow husbands and wives operating a family farm to qualify easily for separate (double) crop subsidy payments; the second—the one chosen—to make it impossible; and the third, to try to distinguish between farm families through the application of extensive administrative regulations. Once it is recognized that the Secretary had no obligation under the statute to choose the third option because it necessarily implied a significant commitment of governmental resources, it follows that the Secretary was free to choose either the first or second. Put another way, there was no encompassing, administratively practicable middle ground.[6]

Appellee argues, and the district court agreed, that the policy of the statute obliged the Secretary to choose the first option over the second since the former would encourage the operators of sizable family farms to divert greater acreage from production. As the court below put it, "the husband-wife rule operates to allow supply in excess [of] that intended by Congress." *WIFE*, 682

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instance, if they could demonstrate that their marriages do not involve the sorts of efficiencies that characterize the typical marriage—would invite problems of administration different in both kind and magnitude from those attending the "minor child" exceptions. Not only would—as the Secretary reasonably believed—a substantial percentage of farm couples petition to receive separate payments, but also the essential condition alleged in each such petition would be exceedingly difficult to verify.

[6] It might be said that Congress settled on a middle ground in 1987, but the territory affected was tightly circumscribed. Congress required the Secretary to assume the administrative burden of verifying the existence of separate operations *only* for those farm households where the husbands and wives owned separate and unrelated farms prior to the marriage.

As we understand WIFE's argument (at least the constitutional claim), it would perforce apply to the statute as amended in 1987. Thus, the district court *en passant* suggested that the 1987 amendment, by codifying the husband-wife rule, was itself unconstitutional. *WIFE*, 682 F. Supp. at 608 n. 17.

F. Supp. at 604. This analysis impermissibly ignores the purpose of the payment limitation which *itself* operates to restrict the amount of acreage diverted from production; we cannot examine the husband-wife rule exclusively through the lens of "maximum participation" without according some significance to Congress' willingness to impose a payment limitation on the program. The district court's approach—focusing only on the overall purpose of the statute and disregarding the purpose of the payment limitation—was quite artificial. "[P]ermitting nullification of [administrative] classifications based rationally on nonprimary legislative purpose[s] would allow courts to peruse legislative proceedings for subtle emphases supporting subjective impressions and preferences." *McGinnis v. Royster*, 410 U.S. 263, 277 (1973) (applying constitutional test of rationality). We cannot help but conclude that the district court's reasoning was driven by just such preferences. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law").

As we have noted, the husband-wife rule was at least partially inspired by draft regulations proposed by Representatives Conte and Findley in connection with a floor amendment they offered unsuccessfully during the House debate on the 1970 Act. That amendment, *inter alia*, would have authorized the Secretary to issue regulations preventing "circumvention or evasion" of the payment limitation, *see* 116 CONG. REC. 27,141 (1970), and the draft regulations included the husband-wife rule as an example of a prophylactic protection against evasion. *See id.* at 27,142. The amendment was defeated, and from that event appellee concludes that Congress disavowed any generalized purpose of preventing evasion of the payment limitation and, indeed, had a specific intent to reject the subordinate husband-wife rule. We think appellee's interpretation of the amendment's legislative

history is more imaginative than real. The defeated Conte-Findley amendment, in addition to incorporating into the statute explicit anti-evasion language, would have reduced the payment limitation (then being debated) from $55,000 to $20,000. *Id.* at 27,141. It therefore was reasonable for the Secretary to conclude that the draconian cut in payments, rather than the evasion language, led to Congress' defeat of the Conte-Findley amendment. After all, the statute, as passed, not only authorized the Secretary to define the term "person," it charged him with "prescribing such rules as he determine[d] necessary to assure a fair and reasonable application of [the] limitation." *See* Agricultural Act of 1970, § 101(4), 84 Stat. at 1359. That delegation of responsibility would seem necessarily to include a direction to prevent evasion, since it is inconceivable that Congress would think "evasion" of a limitation was "fair and reasonable." The very word "evasion" suggests the opposite.

Although we would uphold the Secretary's definition of the term "person" as a lawful interpretation of the statute even if the statute had only recently been enacted, we think the fact that the husband-wife rule has lasted for 17 years and has survived several congressional reauthorizations of the crop-subsidy program adds support to our decision. *See supra* p. 13. It is not as if Congress was generally unaware of the regulation at issue during this period. In 1973, Congress required the Secretary to continue treating corporations and their stockholders in the manner specified in his original regulation. *See* Pub. L. No. 98-86, § 101(4), 87 Stat. 221, 222 (1973); *see also* Pub. L. No. 99-500, § 108(c)(1)(A), 100 Stat. 1783, 1783-347 (1986) (directing Secretary to "determine ways in which [the payment limitation] regulations can be revised to better ensure the fair and reasonable application of limitations and eliminate fraud and abuse in the application of such payment limitations"). True, Congress did not legislatively ratify the husband-wife

rule until 1987, *see, e.g., AFL-CIO v. Brock*, 835 F.2d 912, 915-16 (D.C. Cir. 1987) (describing legislative reenactment doctrine), but we think Congress' explicit recognition of the Secretary's regulations is entitled to some weight in determining whether that regulation is at least a reasonable interpretation of the statute. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)).

III.

Since we have concluded that the challenged regulation is authorized by the statute, we test WIFE's constitutional claim as if the regulation was itself part of the statute. We ask ourselves whether the statute, if it included the husband-wife rule, would withstand constitutional examination.

The Due Process Clause of the Fifth Amendment and its equal protection component protect individuals generally from arbitrary burdens on life, liberty, and property interests on the one hand, and arbitrary statutory classifications on the other. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 609 (1974). Enforcement of these constitutional guarantees, though, does not require the judiciary "to sit as a superlegislature" in judgment of the wisdom of Congress' "legislative policy determinations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In the realm of social and economic regulation, in particular, the role of the courts is narrow: only if Congress' choice in imposing burdens or erecting classifications represents " 'a display of arbitrary power, not an exercise of judgment,' " *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976) (quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937)), is judicial intervention warranted. *See also Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (classification may be sustained only if it rests "upon some reasonable differentiation fairly related to the object of the regula-

tion"). Insistence on a tight fit between legislative means and ends is called for only when Congress acts along suspect (or semi-suspect) lines or in contravention of fundamental liberties, *see e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *City of New Orleans*, 427 U.S. at 303; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-26 (1982), for it is otherwise presumed that "democratic processes" are available to remedy "even improvident [legislative] decisions." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

We think the district court was quite correct in concluding that heightened scrutiny of the husband-wife rule is inappropriate because the rule does not "interfere directly and substantially with the right to marry," *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978). The rule neither "place[s] [a] direct legal obstacle in the path of persons desiring to get married," *id.* at 387 n.12, nor significantly discourages marriage. *Id.* As such, our inquiry is limited to asking whether "the legislation classif[ies] the persons it affects in a manner rationally related to legitimate government objectives." *Wilson*, 450 U.S. at 230; *see also Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481, 2489-90 (1988); *Bowen v. Gilliard*, 107 S. Ct. 3008, 3017 (1987); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Given our disposition of appellee's administrative law challenge, the constitutional analysis should not be particularly troublesome. The Tenth Circuit, presented with the same constitutional question, had little difficulty in finding the financial interdependence of husband and wife to constitute a rational basis for the regulation. *See Martin*, 639 F.2d at 650-51.

The district court, nevertheless, thought that the justifications offered to support the rule were pretextual. At its core, the rule was believed by the district court to harbor a stereotypical and belittling judgment about the role of women in marriage. *WIFE*, 682 F. Supp.

at 605, 607. There are two difficulties with the court's reasoning. The first is that the court was quite obviously engaged in review which more nearly equates with heightened scrutiny than that which accompanies the more deferential determination as to whether or not a challenged statute passes the rational-basis test. When applying the latter test, the Supreme Court has often stated that a classification may be sustained if any *conceivable* justification would support it. *See Kadrmas*, 108 S. Ct. at 2489-90; *Gilliard*, 107 S. Ct. at 3017.[7] Ordinarily, there is no necessity in rational-basis scrutiny for a separate inquiry into the legislature's *actual* motivation, for the legislature's subjective motivation does not undermine a classification's validity provided legitimate motivations are conceivable. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 875 n.5 (1985) (remanding for examination of additional conceivable justifications after proffered justifications were rejected as impermissible).[8] Second, we disagree that impermis-

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[7] The "any conceivable basis" formulation of the rational-basis test appears more frequently than any other in Supreme Court opinions. We recognize, nevertheless, that the Court has on occasion looked only to *articulated* legislative purposes in applying rational-basis scrutiny to challenged classifications. *See, e.g., Cleburne Living Center*, 473 U.S. 432, 446, 450 (1985); *Plyer v. Doe*, 457 U.S. 202, 228-30 (1982). By characterizing the rational-basis test as we do in text, we do not mean to suggest that such a deferential formulation is determinative of the outcome in this case. As we have shown in Part II, Congress satisfactorily articulated the policy considerations the Secretary attempted to accommodate in promulgating the husband-wife rule; thus, were we to examine only Congress' articulated purposes, we would reach the same conclusion as to the constitutional question.

[8] If it can be established that Congress' subjective motivation was purposefully to discriminate along lines that would warrant heightened scrutiny, such actual legislative motivation can be highly relevant. *See, e.g., Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (race); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1986) (same); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (gender).

sible stereotyping is here lurking behind the facade of a sex-neutral explanation. Appellee has offered nothing to show that the regulation implies anything at all about the respective roles of men and women in a marriage. We have no grounds for concluding that the regulation does anything more (or less) than assume that, whatever their roles, married men and women constitute one economic unit—that "marriage is an event which normally marks an important change in economic status." *Califano v. Jobst*, 434 U.S. 47, 53 (1977).

The treatment of wife and husband as a unit in modern settings is not, as appellee suggests, inevitably malign. Coontemporary community property regimes (stripped, of course, of the ancient rule that made the man "head and master" of jointly-owned property,[9] *see Kirchberg v. Feenstra*, 450 U.S. 455 (1981)) have not commonly been thought invidious. A quite similar premise is embedded in the Internal Revenue Code, which provides separate tax schedules for married and unmarried persons, *see* I.R.C. § 1 (Supp. V 1987); *see generally Druker v. Comm'r*, 697 F.2d 46 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983),[10] and we see no basis to

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[9] Blackstone's explanation of the "ancient rule" seems shocking today:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.

1 BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND 442 (3d ed. 1768).

[10] As a general rule of thumb, marriage will increase a couple's tax burden as compared with that of two single persons whenever the lesser-earning spouse earns 20% or more of the

challenge this policy premise as demeaning of either women or men, or the institution of marriage.[11] *See also* 26 U.S.C. § 2056(a) (Supp. V 1987) (exempting from estate taxes bequests to surviving spouses).

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couple's total income and decrease its tax burden whenever the lesser-earning spouse earns less than 20%.

*Druker*, 697 F.2d at 49 n.2 (citing Gerzog, *The Marriage Penalty: The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27, 28 (1978)); *see also* STAFF OF JOINT COMMITTEE ON TAXATION, 99th CONG., 1ST., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 (Comm. Print 1987) (analyzing current tax-rate schedules). By placing a financial premium on having the "lesser-earning spouse" (usually the wife, as a statistical matter) stay at home, it could be argued that the Internal Revenue Code harbors a sexist judgment about the "proper" role of women in marriage. *Cf. Druker*, 697 F.2d at 49 n.2. Instead, however, the Code's treatment of married couples has customarily been perceived as ensuring horizontal equity between married couples, *see Druker*, 697 F.2d at 50; this principle, of course, is rooted in the notion that a marital household is a distinct economic unit.

[11] Conceding that economic interdependence might be relevant under some statutory schemes, the district court suggested that "it is plainly irrelevant under the crop subsidy program." *See WIFE*, 682 F. Supp. at 605. The district court's view was apparently based on the notion that Congress did not expressly articulate an interdependence test in enacting the crop subsidy payment limitation. *See id.* at 604. This confuses constitutional analysis of the rule with inquiry into the rule's validity under the farm support statute. Once one concludes that a challenged regulation is founded on a rational accommodation of Congress' objectives in enacting the underlying statute, the constitutionality of the regulation is tested as if Congress struck the balance embodied in the regulation. Thus, it is irrelevant to the constitutional question that Congress did not *expressly* articulate an economic interdependence qualification in the farm support statute. It is doubly irrelevant, of course, if our constitutional inquiry is limited to asking whether any *conceivable* government objective might rationally support the husband-wife rule. *See Kadrmas*, 108 S. Ct. at 2489-90 (1988); *Bowen*, 107 S. Ct. at 3017; *McGowan*, 366 U.S. at 426. In any event, the district court's narrow conception of Congress' legitimate objectives prompted the court to overstep the boundaries of rational-basis scrutiny.

That married persons constitute a distinct economic unit is an assumption quite similar, we think, to the legislative presumption challenged in *Lyng v. Castillo*, 477 U.S. 635 (1986). The Supreme Court there held that Congress could rationally presume, when dispensing food stamps to needy persons on a household-by-household basis, that a husband and wife, a husband and wife with children, or siblings all living under one roof, constitute only one household—whether or not they could show they prepared their meals separately. *See* 7 U.S.C. § 2012(i) (1982 & Supp. V 1987). Congress "could reasonably determine that close relatives sharing a house—almost by definition—tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined." *Id.* at 642. The court rejected the argument that the statute was unconstitutional merely because not every family conformed to the legislative model since the "cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate households unquestionably warrant[ed] the use of general definitions[.]" *Id.* at 640-41. It seems clear, then, that Congress constitutionally may legislate with a family model in mind that reflects economic and social reality. *See also Califano v. Boles*, 443 U.S. 282, 289 (1979) (upholding law providing "mother's insurance benefits" to widows and divorced wives of wage earners but not to mothers who never married the child's father on basis that "Congress could reasonably conclude that a woman who has never been married to the wage earner is far less likely to be dependent on wage earner at the time of his death").

The district court, relying on *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), also thought that the Secretary's regulation failed constitutional rationality because wealthy and clever farm couples could escape its restrictions, whereas relatively poorer ones could not. Thus, as is undisputed, if a husband and wife formed a

corporation to operate their farm—and met the corporation eligibility standards—they could qualify for two maximum payments, one for the corporation itself and one more for the two of them as stockholders. Of course, the husband-wife rule would still distinguish a "marriage" corporation from one formed by two unmarried stockholders because the latter could entitle its creators to three separate payments. It is argued, nevertheless, that the corporate device is a unique advantage available to the privileged and not to "those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements [so] as to retain their eligibility." *WIFE*, 682 F. Supp. at 606 (quoting *Moreno*, 413 U.S. at 538).

It seems rather peculiar to us to describe a family farm operated by a husband and wife, one that is so large as to qualify for the maximum crop payment of $50,000, as "desperately in need of aid." Indeed, we cannot imagine why any couple bumping up against that ceiling would be significantly less financially capable to form a corporation than any other—depending, of course, on varying state corporation laws. In any event, we do not read *Moreno* (particularly as interpreted and limited by *Lyng v. Castillo*) constitutionally to oblige Congress or the Secretary to ensure tha all farm couples who are entitled to the maximum crop payment have the same advantages that those, arguably smarter or wealthier than the rest, enjoy through use of the corporate form. To so hold, it seems to us, would come perilously close to the discredited view of substantive due process employed in the early part of this century—albeit in favor of redistributive policies rather than against them. *Moreno*—subsequently described by Congress as striking down an anti-"hippie-commune" limitation on the distribution of food stamps, *see Castillo*, 477 U.S. at 639 n.3 (quoting H. REP. NO. 464, 95th Cong., 1st Sess. 140 (1977))—

merely held that Congress' anti-fraud purpose was not served by refusing food stamps to those who shared their households with nonrelatives. Its holding was not directed to any disparate treatment between the wealthy and poor, let alone between the wealthy and the merely well-off.

Congress—through the Secretary—has reasonably determined that married couples, as a group, are more likely than other "partners" in farming enterprises to share completely in the products of their efforts—in other words, to be economically interdependent—and the Constitution requires no more precision than this in the circumstances we confront. *See Bowen v. Owens*, 476 U.S. 340, 348-50 (1986); *Boles*, 443 U.S. at 289; *Jobst*, 434 U.S. at 53; *Mathews*, 429 U.S. at 188-89; *Weinberger v. Salfi*, 422 U.S. 749, 780-85 (1975). For "[g]eneral rules are essential if a [program] of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Jobst*, 434 U.S. at 53; *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The judgment is accordingly reversed and the cause remanded to the district court for vacatur of the injunction entered against enforcement of the husband-wife rule and for further proceedings not inconsistent with this opinion.

*It is so ordered.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 88-5192

WOMEN INVOLVED IN FARM ECONOMICS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
*Appellants*

---

Appeal from the United States District Court
for the District of Columbia

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Before: RUTH B. GINSBURG, SILBERMAN and BUCKLEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded with

instructions and for further proceedings, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

/s/ [Illegible]

Date: June 2, 1989

Opinion for the Court filed by Circuit Judge Silberman.

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 87-1752

WOMEN INVOLVED IN FARM ECONOMICS,
*Plaintiff*,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, *et al.*,
*Defendants.*

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## MEMORANDUM OPINION

[Filed March 31, 1988]

Plaintiff, a national non-profit women's agricultural trade association, brings this action against defendants under the fifth amendment and the Administrative Procedure Act ("APA"), challenging a regulation promulgated by the Secretary of the Department of Agriculture that treats a husband and wife as one "person" for purposes of a $50,000 limitation on agricultural crop subsidy payments. The matter now comes before the Court on the parties' cross-motions for summary judgment and on defendants' motion to dismiss for mootness. For the reasons set forth below, defendants' motion to dismiss and motion for summary judgment are denied, and plaintiff's motion for summary judgment is granted.

### I. STATUTORY FRAMEWORK

Under 7 U.S.C. § 1308, annual payments for the years 1986 through 1990 that "a person shall be entitled to

recover" under certain agricultural crop subsidy programs administered by the Agricultural Stabilization and Conservation Service are limited to $50,000. In 1970, acting in his discretion to define the term "person" and to prescribe "such rules as the Secretary determines necessary to assure a fair and reasonable application of the limitation established under the section," 7 U.S.C. § 1308 (5)(A), the Secretary of Agriculture promulgated federal regulations implementing Section 1308. 35 Fed. Reg. 19339 (Dec. 20, 1970). The Secretary set out three primary substantive criteria for an "individual, joint stock company, corporation, association, trust, estate, or other legal entity" to be considered a "person." Specifically, the individual or other legal entity must:

> (a) Have a separate and distinct interest in the land or the crop involved,
>
> (b) Exercise separate responsibility for such interest, and
>
> (c) Be responsible for the cost of farming related to such interest from a fund or account separate from that of any other individual or entity.

7 C.F.R. § 795.3. Partnerships and joint operations may also be considered separate persons if

> the individual or other legal entity is actively engaged in the farming operations of the partnership or other joint operation. An individual or other legal entity shall be considered as actively engaged in the farming operation only if its contribution to the joint operation is commensurate with its share in the proceeds derived from farming by such joint operation. Members of the partnership or joint venture must furnish satisfactory evidence that their contributions of land, labor, management, equipment, or capital to the joint operation are commensurate with their claimed shares of the proceeds.

7 C.F.R. § 795.7.

One category of individuals, however, was automatically barred from qualifying for separate payments regardless of whether they satisfied these interest, contribution, responsibility, and active engagement criteria: married couples. 7 C.F.R. Section 795.11 provides: "A husband and wife shall be considered as one person." It is this regulation that plaintiff challenges here.

## II. ANALYSIS

Plaintiff challenges Section 795.11 under the fifth amendment both as an infringement on the fundamental right to marry and as impermissible discrimination on the basis of gender.[1]

The appropriate level of scrutiny to be applied to a challenged regulation is determined by the nature of the right or classification involved. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974). When the regulation "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disad-

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[1] Defendants challenge plaintiff's standing to "make certain arguments" related to the constitutionality of Section 795.11 because, defendants argue, plaintiff has not alleged that its members have been adversely affected by the rule in all the situations that plaintiff suggests in its brief. This argument is without merit.

The affidavit of Naioma Benson, President of Women Involved in Farm Economics, makes clear that the organization's members are adversely affected by the regulation in numerous different ways and this is broadly alleged in the complaint. Plaintiff need not list every possible permutation by which its members could qualify for separate payments under existing regulations aside from Section 795.11 to attack the regulation's constitutionality. Some WIFE members owned and operated farms separately from their husbands before and after marriage. Some separately acquired, owned, and operated their farms during marriage. These asserted injuries are sufficient to confer standing to assert the constitutional challenge in this action. *See National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 693 (D.C. Cir. 1971) (organizational standing); *see also National Association of Neighborhood Health Centers v. Mathews*, 551 F.2d 321, 328-29 (D.C. Cir. 1976).

vantage of a suspect class," then strict scrutiny is to be applied. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Under the strict scrutiny standard, a statutory classification cannot be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 388 U.S. 374, 388 (1978).

The right to marry is fundamental. *Zablocki*, 434 U.S. at 383; *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The threshold issue here is whether Section 795.11 "directly and substantially interferes" with the right. *Zablocki*, 434 U.S. at 387. Only then is strict scrutiny appropriate.

In drawing the line between cases where state regulation "directly and substantially interferes" with the right to marry and those where it does not, the courts have distinguished between state action that attempts to affect an individual's decision to enter into a marital relationship and legislation or regulations that merely set up classifications for state benefits based on marital status. *See Zablocki*, 434 U.S. at 386 (citing *Jobst v. Richardson*, 434 U.S. 47, 55 n.12 (1977)); *id.* at 403-04 (Stevens, J., concurring in judgment). Heightened scrutiny is mandated where the government has directed that a person "may only marry if," for example, she obtains the state's permission, *Zablocki*, 434 U.S. 374,[2] *Israel v. Im-*

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[2] The challenged statute in *Zablocki v. Redhail*, 434 U.S. 374 (1978) provided that "no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses." *Id.* at 387.

The Court focused on the direct prohibitive impact of the statute: "Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married." *Id.*

*migration and Naturalization Service*, 785 F.2d 738 (9th Cir. 1986),[3] is able to pay a filing fee, *see Zablocki*, 434 U.S. at 387; *see also Boddie v. Connecticut*, 401 U.S. 371 (1971),[4] or is of a certain race. *Loving*, 388 U.S. 1 (miscegenation).[5] Where, however, the government has classified state benefits, such as employment[6] and welfare benefits,[7] or state burdens, such as taxes,[8] on the basis of

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[3] Though similar at first blush to *Zablocki* and *Israel*, *Turner v. Safley*, 107 S. Ct. 2254 (1987), cited by defendants, in which the Supreme Court held unconstitutional a regulation permitting prison inmates to marry only with the permission of the prison superintendent is, upon examination, inapposite. In that case, the Court applied a unique standard of scrutiny because of the prison setting, requiring only that the statute be reasonably related to legitimate penological interests of the state. *Id.* at 2261.

[4] Filing fees that prohibit indigent couples from marrying constitute this type of direct interference. *See, e.g., Murillo v. Bambrick*, 681 F.2d 898 (3d Cir.), *cert. denied*, 459 U.S. 1017 (1982) (court declined to apply strict scrutiny to $50 filing fee in matrimonial actions because fee did not prohibit individuals from obtaining a divorce); *but see id.* at 916 (dissent suggesting that some indigent married individuals might not be able to afford even this minimal filing fee).

[5] This same focus on interference with the decision *to enter into* marriage motivates the courts' frequent mention of whether the regulation at issue actually deterred the individual challenging it from getting married. *See Zablocki*, 434 U.S. at 387 n.12; *Cutts v. Fowler*, 692 F.2d 138, 141 (1982).

[6] *See, e.g., Cutts v. Fowler*, 692 F.2d at 141 (burden imposed by anti-nepotism rule too "attenuated and indirect" to invoke strict scrutiny); *Parsons v. County of Del Norte*, 728 F.2d 1234 (9th Cir.), *cert. denied*, 469 U.S. 846 (1984) (no-nepotism rule not subject to strict scrutiny).

[7] *Bowen v. Gillard*, 107 S. Ct. 3008, 3017 (1987) (AFDC benefits); *Lyng v. Castillo*, 106 S. Ct. 2727, 2729 (1986) (Food Stamp program definition of "household"); *Sturgell v. Creasy*, 640 F.2d 843, 853 (6th Cir. 1981) (AFDC benefits).

[8] *See, e.g., Druker v. Commissioner of Internal Revenue*, 697 F.2d 46, 50 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983);

marital status, strict scrutiny is not warranted. *Jobst*, 434 U.S. 47.[9] The distinction is more than semantic; it is based on the principle that the Constitution protects individuals from intentional state action that interferes in the privacy and family interests that make certain marital decisions fundamentally important. *Zablocki*, 434 U.S. at 387 n.12; *Moran v. Beyer*, 734 F.2d 1245, 1246 (7th Cir. 1984).[10]

The husband-wife rule does not prohibit or condition the right to marry on any test created by the government. Instead, it classifies beneficiaries of a federal program based on marital status. It is not, therefore, the type of regulation where the Supreme Court has applied strict scrutiny. The Tenth Circuit reached this same

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*Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 1046 (1978) ("elevated tax burden might in fact dissuade some couples from entering into matrimony, but that does not present an insuperable barrier to marriage. More often it changes the relative attraction of different prospective spouses for the tax-minded individual wishing to marry . . . ."); *Ensminger v. Commissioner of Internal Revenue*, 610 F.2d 189, 193 (4th Cir. 1979), *cert. denied*, 446 U.S. 941 (1980) (IRS's disallowance of dependency deduction by unmarried couple not subject to strict scrutiny, citing *Jobst*).

[9] The Supreme Court has since characterized *Jobst* as a case involving "legislation providing governmental payments of monetary benefit that has an incidental effect on a protected liberty." *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978).

[10] The court in *Moran v. Beyer*, 734 F.2d 1245 (7th Cir. 1984), observed that while "the courts have come to confer this heightened protection upon certain decisions relating to marriage," "not every choice made in the context of marriage implicates the privacy and family interests which make certain marital decisions fundamentally important." *Id.* at 1246 (citing *Jobst; Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right to divorce); *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942) (procreation); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing and education)).

conclusion in a similar challenge to Section 795.11 seven years ago. In *Martin v. Bergland*, 639 F.2d 647 (10th Cir. 1981), the court concluded that "Section 795.11 is not such a direct and substantial burden on appellants' freedom to marry that it should be strictly scrutinized." *Id.* at 649. Merely because the statute may deter some people from getting married or burden some who do marry, *Jobst*, 434 U.S. at 54, or encourages couples to modify their living arrangements, *Bowen v. Gillard*, 107 S. Ct. 3008, 3017 n.8 (1987), *Sturgel v. Creasy*, 640 F.2d 843, 853 (6th Cir. 1981), does not render it a direct and substantial interference with the freedom to marry. While the regulation may well, as plaintiff contends, "deprive[] women of significant financial agricultural income, and in some instances, the viability of their farming operation, solely on the basis of whether or not they choose to marry," Plaintiff's Motion for Summary Judgment, at 7, this regulatory interference is not sufficiently *direct* to invoke scrutiny.

Accordingly, strict scrutiny will not be applied here. It remains to be determined whether the statute survives the rational basis test. "Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). In applying the rational basis test, a court may not substitute its own "personal notions" of good public policy for those of Congress; merely because a classification is "imperfect" does not render it unconstitutional. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). Nonetheless, the rational basis standard is "not a toothless one." *Id.* at 234 (citing *Matthews v. Lucas*, 427 U.S. 495, 510 (1976)). For the reasons set forth below, the regulation at issue is found infirm.

The government's interest in the husband-wife regulation promulgated by the Secretary of Agriculture must

be viewed in the context of crop subsidy program enacted by Congress in 1970. Agricultural Act of 1970, Pub. L. 91-524, 91st Cong., 1st Sess., 84 Stat. 1358; *Moreno*, 413 U.S. at 533. The congressional intent behind the crop subsidy program is clearly expressed in the legislation itself—to exert governmental control over the supply and price of certain primary crops by strategically reducing the amount of planted acreage. When the subsidy program was enacted, the Chair of the House Agricultural Committee, Representative Poage, explained that the subsidy payments were necessary to encourage participation in the program: "The whole success of the program is based on participation. . . . The only way that you can get a balance between supply and demand under this bill is through widespread participation in the program." 116 Cong. Rec. 27452 (Aug. 5, 1970). Defendants concede that "[w]hile traditional free market economists would decry [the government's] interference with the free market forces of supply and demand, it has been the policy of the United States since at the least the enactment of the Agricultural Adjustment Act of 1937 during the New Deal to protect agricultural prices at government expense, in order to supplement the income the farmer receives by harvesting and selling his crops." Defendants' Motion for Summary Judgment, at 3.

Providing this statutory mandate as guidance, Congress delegated the task of determining eligibility requirements for the subsidy program (by *inter alia* defining the term "person") to the Secretary of Agriculture. Congress gave no indication, however, that distinctions among beneficiaries should be drawn along lines of marital status. The only legislative history addressing the husband-wife rule is "draft regulations" proposed by Representatives Conte and Findley, which were designed to prevent evasion of the subsidy limitation "through such devices as subdivision of farms." 116 Cong. Rec.

27141 (Aug. 4, 1970). The "draft regulations" provided that partnerships, corporations, associations, estates or trusts, joint tenancies, and family trusts were to be considered as single producers. *Id.* The "draft regulations" also provided that "Husband and wife shall not be considered as separate producers nor recognized in any other capacity . . . ." *Id.* at 27142. Defendants seize on the proposed amendment as evidence of Congress's concern that married couples could easily evade the crop subsidy limitation. Unadopted amendments, however interesting, provide little useful evidence of legislative intent. For one, defendants concede that the Conte-Findley amendment was not adopted, and thus, implicitly, rejected. While defendants suggest that the only reason Congress failed to enact a husband-wife rule was that the proposed amendment had too low a payment limitation, this attempt to divine the motives of Congress is too speculative. Congress' ultimate action on this issue—*i.e.*, not enacting such a rule—is the most authoritative source for determining intent. Instead of setting forth specific rules, Congress gave the Secretary authority to prescribe such regulations as were necessary "to assure a fair and reasonable application of the limitation." 7 U.S.C. § 1308(5). Thus, the "legitimate government interest" as expressed in Section 1308 is to insure that the crop subsidy program is fairly and reasonably applied.[11] The analysis turns next to the question of whether the Secretary's regulation is rationally related to this legitimate governmental interest.

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[11] The other possible "interest" behind the rule could, arguably, be some belief that, as a governmental policy, married individuals should not be recognized as independent agricultural producers. Defendants do not suggest this rationale; it would indeed clearly not be a *legitimate* governmental interest. The government may not seek to enforce stereotypical notions of proper family conduct through exclusions from benefit programs. *See United States Department of Agriculture v. Moreno*, 413 U.S. 528 (not legitimate purpose to exclude politically unpopular group from benefit program).

Defendants contend that the husband-wife rule is rational because it prevents evasion of the crop subsidy limitation. Examination of this argument, however, in light of Congress's intent that participation in the program be encouraged while at the same time insuring that payments are fairly and reasonably made, shows that the husband-wife rule is not rationally related to this legitimate governmental purpose.

Excluding a particular group of farmers, *e.g.*, married women, who otherwise might qualify for participation in the program were it not for their marital status undermines the basic purpose of reducing the quantity of planted acreage of certain crops. For example, two married farmers with separately owned farms could have twice as much otherwise qualified acreage in production as two unmarried farmers with separately owned farms, even if these latter individuals were cohabitants or divorced. Thus, the husband-wife rule operates to allow supply in excess than that intended by Congress. Where a regulation works against the core purpose of government action, it is not rational. *See Moran*, 734 F.2d 1245 (holding unconstitutional Illinois' interspousal tort immunity statute as not rationally related to purpose of maintaining marital harmony).

Further indication of the lack of rational basis for the husband-wife regulation is Congress' recent adoption of legislation that would expressly require the Secretary to allow couples who separately owned their farms prior to and during marriage to receive separate payments.[12] Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, 101 Stat. 1330. While the new regulations would also require that husband and wife otherwise be treated as one person, that does not resolve the issue of whether the Secretary was correct in promulgating such a regu-

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[12] This amendment is discussed further below with regard to defendants' motion to dismiss for mootness.

lation prior to this most recent expression of intent. That Congress has amended the regulations for future crop years strongly suggests that the present regulation is not consistent with congressional intent that the regulations be promulgated fairly and reasonably.

It is also wholly unpersuasive to argue, as defendants do, that Section 795.11 is rational because the farming operations of married couples are always economically interdependent, and therefore, it is futile or too expensive to bother distinguishing among them. First, the government does not dispute that some, though certainly not all, spouses with farming operations would both be able to qualify for crop subsidy limitation in the absence of the husband-wife rule.[13] Plaintiff's representation that some of its members are adversely affected by the rule is unchallenged. The most obvious example of unfairness is where, prior to marriage, both spouses owned and operated separate farms, and both received crop subsidy payments.[14] Even had they maintained the separation of their farms after marriage, both individuals could not continue to receive payments under Section 795.11. Although this was the fact situation in *Martin*, 639 F.2d 647, the court nonetheless found the regulation rational because of the "economic interdependency of married couples." This Court finds this conclusion wholly unpersuasive. While marital status might be a relevant test of economic dependency for other statutory purposes, *see, e.g., Jobst*, 434 U.S. at 54 (allocation of disability benefits), it is plainly irrelevant under the crop subsidy

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[13] As discussed *infra*, the government's estimate that crop subsidies would increase by $182 million without the husband-wife rule, *see* Declaration of Wayne Bjorlie, appears based on faulty assumptions. Plaintiff readily admits that not all married farming couples would qualify for a second payment given the other eligibility criteria already set forth in the regulations.

[14] It is this most obvious unfairness that Congress has recently sought to correct starting in the 1989 crop year. *See infra.*



program. Indeed, the Secretary has seen fit to not make such stereotypical assumptions with regard to other economically dependent entities, *e.g.*, partnerships, and instead created substantive criteria for them to meet in order to be eligible for payments. Rationally, the same analysis should apply to married couples.

Plaintiff also argues that treating a husband and wife as one person is illogical as a matter of plain statutory language. Even though Congress did not explicitly define the term "person" and delegated this task to the Secretary, it is, nonetheless, worth noting as persuasive plaintiff's argument that the plain and ordinary meaning of the term "person" requires rejection of the archaic notion that husbands and wives are one "person." *See also Eisenstadt*, 405 U.S. at 453 ("the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup"). The plain meaning of the statutory language is entitled to great weight. *Mills Music, Inc. v. Snyder*, 472 U.S. 153 (1985).

The government's other suggestion that the automatic bar of Section 795.11 minimizes fraud on the crop subsidy program is also unsupported. The government has not adequately explained how married couples could defraud the program given the substantive eligibility criteria—interest, contribution, responsibility, and active engagement—set out elsewhere in the regulations. Nor have defendants explained why they pinpointed married couples as such significant potential sources of fraud (thus requiring an absolute rule) rather than other related "persons" (e.g., adult family members or farming partnerships) that could similarly, under defendants' logic, have incentives to evade the maximum payment limitation. Mere assertions of the potential for fraud are insufficient to find a classification rational. *See Moreno*, 413 U.S. at 535 (food stamp program's definition of "household"). Defendants have not suggested that

these present criteria are ineffective in weeding out unqualified applicants for the subsidy program. The agency judgment embodied in these regulations is that a straightforward factual inquiry into the economics of the farming operation is an effective means of achieving the goals of the crop subsidy program.[15] In contrast, an automatic exclusion ignores the value of such an inquiry. *See Israel*, 785 F.2d at 742 n.8 ("A factual inquiry into the legitimacy of the marriage . . . speaks more pointedly and straightforwardly to the state's interest . . . ."). Furthermore, the existence of other qualitative criteria undermines the government's position that Section 795.11 was intended to prevent these same potential abuses and refutes the argument of administrative burden since such "costs" are already being willingly incurred by the government in evaluating the applications of non-married farmers. *See Moreno*, 413 U.S. at 537.

Finally, the government does not dispute that the existing regulatory scheme may allow the more clever and financially able farming couples to circumvent the husband-wife rule by creating partnerships or corporations. While this may mean that some married couples are currently avoiding (legally) the consequences of the husband-wife rule, this only underscores its lack of rationality and suggests that the burden of the rule is falling on those farmers least financially capable of maintaining their farms without it. This type of inequity is similar to the one the Supreme Court found intolerable in *Moreno*: "Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are 'likely to abuse the program,' but rather, *only* those persons who are so des-

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[15] For a discussion of the scrutiny applied by the government to applications for crop subsidy program by related farmers, see, *e.g.*, *Esch v. Lyng*, No. 87-0885 (D.D.C. June 5, 1987, July 22, 1987) (explaining application process and review procedures in context of nine siblings seeking separate "person" status).

perately in need of aid that they cannot even afford to alter their living arrangements as to retain their eligibility." 413 U.S. at 538.

In short, the husband-wife rule, while not a direct and substantial enough interference with the right to marry to invoke strict scrutiny, is nonetheless unconstitutional because it is not rationally related to achievement of the legitimate government purpose behind the crop subsidy limitation program.

This finding that the classification based on marital status does not have a rational basis obviates the need to address the merits of plaintiff's alternative constitutional challenge on the basis of gender.

*B. Administrative Procedure Act*

Plaintiff's final attack on Section 795.11 is that it violates the APA both because it is arbitrary and capricious agency action and because the regulation promulgated is in excess of the agency's statutory authority. 5 U.S.C. § 706.

Courts can "hold unlawful and set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Oklahoma Aerotronics v. United States*, 661 F.2d 976, 977 (D.C. Cir. 1981). While review is limited, "the Supreme Court has cautioned that courts must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *United States Army Engineer Center v. Federal Labor Relations Authority*, 762 F.2d 409, 414 (4th Cir. 1985) (citing *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89 (1983)). Application of this test in this case is, to a large extent, similar to the constitutional rational basis test. *See Wawszkiewicz v. Depart-*

*ment of the Treasury*, 670 F.2d 296, 301 (D.C. Cir. 1981).

Where the dispute is not over statutory interpretation, but one of whether the agency has exceeded its statutory authority, the agency's mandate must be examined. As concluded above in the discussion of the regulation's constitutionality, the policy of completely barring married couples from qualifying for two payments operates against the congressional policy of encouraging participation in the crop subsidy program and insuring that this policy is implemented fairly. Agency action that is inconsistent with the statutory mandate and that frustrates congressional policy cannot be upheld. *Specialty Equipment Market Ass'n v. Ruckelshaus*, 720 F.2d 124, 132 (D.C. Cir. 1983); *Planned Parenthood Federation of America, Inc. v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983). Defendants invite the Court to defer to the agency's interpretation of its statutory mandate to define "person." While limited deference is due, *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1422-23 (D.C. Cir. 1983), if Congress has not directly addressed the precise question at issue, "the question for the courts is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Japan Whaling Association v. American Cetacean Society*, 106 S.Ct. 2860, 2868 (1986).

Defendants also argue again that Section 795.11 is not contrary to express legislative intent because Congress was concerned about preventing farmers from evading the payment limitation. Without the husband-wife rule, defendants suggest, the government would have to evaluate a couple's individual applications; defendants estimate that the additional cost to the government from adding more "persons" to the program would be approximately $182 million. Declaration of Wayne Bjorlie. This figure,

however, appears to be a gross overestimate; it is based on the faulty assumption that all married farmer couples could qualify for a second crop subsidy payment. *Id.* ¶¶ 4, 5. This clearly would not be the case. Even assuming the figure were accurate, defendants have not shown that the potential for increased cost to the government can save an otherwise unconstitutional or improper regulation. In addition, the government has not supported its suggestion that evaluating the applications of married couples for separate payments would create a significant administrative burden.

A further infirmity with the agency's action is its failure to "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48 (1983). Here, defendants have not submitted any administrative record indicating what deliberations prompted the Secretary to promulgate the husband-wife rule. Instead, defendants offer the current rationalizations for the rule as well as a questionable estimate of the cost to the government if the rule were abolished. These are entirely unpersuasive. *Motor Vehicle*, 463 U.S. at 50 (regulation must be upheld on basis articulated by the agency, not counsel's *post hoc* rationalizations). In the absence of a record explaining the agency's reasoning behind promulgating the regulation, it is difficult to discern its rationality. The logic of an absolute prohibition on qualifying married individuals as farmers in his or her own right appears only to be based on the assumption that married women are never farmers in their own right. Defendants, understandably, do not now suggest such a frail argument.

Defendants contend finally that Congress' failure (until the recent legislation) to change the husband-wife rule by amendment indicates its contentr ent with the regulation. *North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982) (quoting *United States v. Rutherford*,

442 U.S. 544, 554 n.10 (1979)). This argument is belied by Congress' own recent action in amending Section 795.11. That agency practices are long-established does not alone shield them from judicial review. *Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 118 (1978) (rejecting regulation in effect for 17 years).

In sum, the regulation promulgated by the Secretary is not consistent with the agency's statutory mandate to interpret the term "person" fairly and reasonably in accordance with the congressional mandate to encourage participation in the farm crop subsidy program. Therefore, Section 795.11 violates the APA and cannot stand.

## III. MOOTNESS

In their motion to dismiss, defendants claim that the recent amendment to 7 U.S.C. § 1308, enacted as part of the Omnibus Budget Reconciliation Act of 1987, moots this action. The new statute provides:

> Such regulations shall provide, that with respect to any married couple, the husband and wife shall be considered to be one person, except that any married couple consisting of spouses who, prior to their marriage, were separately engaged in unrelated farming operations, each spouse shall be treated as a separate person with respect to the farming operation by such spouse so long as such operation remains as a separate farming operation, for the purposes of the application of the limitations under this section.

Section 1303(2)(B)(iii), 133 Cong. Rec. H12108 (Dec. 21, 1987). The Secretary is required to promulgate final regulations implementing the amendments by August 1, 1988. Section 1305(a)(1)(A) and (B), *id.* The amendment is not effective, however, until the 1989 crop year. Section 1301(a), *id.*

Defendants argue that the amendment moots this case both as a matter of law and as a matter of prudence.

Neither argument is availing. The amendment will not be effective until the 1989 crop year. Until then, the present regulations apply and clearly are adversely affecting plaintiff's members.

As a prudential matter, defendants suggests this action should be dismissed because any decision of this Court is certain to be appealed and by the time the appellate court could review the regulations, the new regulations would be in effect. That argument concedes that this case is not mooted by the new amendments. Indeed, defendants acknowledge that this case "is not technically moot because the husband and wife regulations will be applicable for one more crop year." [16] In addition, it would be inappropriate for this Court, faced with a live controversy, to stay its hand merely in anticipation that its decision might be appealed and might, on appeal, be partially mooted by the implementation of the new regulations.[17] Defendants' suggestion that "whatever decision this Court had made concerning [the regulation's] validity and constitutionality will have to be vacated" [18] under the principle announced in *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950), is entirely speculative. This case is neither moot, nor should it be treated differently than any case where legislation will, at a future date, change the regulatory scheme. *See Mississippi River*

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[16] Defendants' Motion To Dismiss, at 5.

[17] This Court, of course, cannot reach the issue of the validity of the new regulations. However, since the new legislation adopts the Secretary's husband-wife rule, with one major exception, similar if not identical constitutional issues to those presented in this litigation might be raised were the new statute to be challenged. The amendments remove plaintiff's constitutional objections in only two respects that do not significantly affect the constitutional analysis: the new husband-wife rule is clearly now enacted by Congress and not by the agency, and the amendment removes the obstacle for one group of married farmers (those who owned farms separately before and after marriage).

[18] Defendants' Motion To Dismiss, at 4-5.

*Transmission Corp. v. FERC*, 759 F.2d 945, 952 n.9 (D.C. Cir. 1985) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422, 1431-32 (D.C. Cir. 1984).

## IV. CONCLUSION

For the reasons set forth above, it is accordingly hereby

ORDERED that defendants' motions to dismiss and for summary judgment are denied, and that plaintiff's motion for summary judgment is granted; it is

FURTHER ORDERED that Section 795.11 is declared unconstitutional, null, and void as a burden on the right to marry that is not rationally related to a legitimate government interest; it is

FURTHER ORDERED that defendants, their officers, employees, and agents, are permanently enjoined and restrained from refusing to allow husbands and wives to qualify as separate persons on the basis of Section 795.11; and it is

FURTHER ORDERED that the effect of this Memorandum Opinion and Judgment is stayed until April 18, 1988 to afford the parties opportunity to seek appellate relief.

IT IS SO ORDERED.

March 31, 1988

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 87-1752

WOMEN INVOLVED IN FARM ECONOMICS,
*Plaintiff*,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
*Defendants*.

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JUDGMENT

In accordance with the Memorandum Opinion issued this date, judgment is hereby entered in favor of plaintiff Women Involved in Farm Economics and against defendants United States Department of Agriculture and Richard Lyng, Secretary of the United States Department of Agriculture.

IT IS SO ORDERED.

March 31, 1988 /s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

## APPENDIX E

### UNITED STATES CONSTITUTION

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX F

### ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706(2)(A)-(C):

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

. . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## APPENDIX G

## AGRICULTURAL ACT OF 1970

### TITLE I—PAYMENT LIMITATION

SEC. 101. Notwithstanding any other provision of law—

(1) The total amount of payments which a person shall be entitled to receive under each of the annual programs established by titles IV, V, and VI of this Act for the 1971, 1972, or 1973 crop of the commodity shall not exceed $55,000.

(2) The term "payments" as used in this section includes price-support payments, set-aside payments, diversion payments, public access payments, and marketing certificates, but does not include loans or purchases.

(3) If the Secretary determines that the total amount of payments which will be earned by any person under the program in effect for any crop will be reduced under this section, the set-aside acreage for the farm or farms on which such person will be sharing in payments earned under such program shall be reduced to such extent and in such manner as the Secretary determines will be fair and reasonable in relation to the amount of the payment reduction.

(4) The Secretary shall issue regulations defining the term "person" and prescribing such rules as he determines necessary to assure a fair and reasonable application of such limitation: *Provided*, That the provisions of this Act which limit payments to any person shall not be applicable to lands owned by States, political subdivisions, or agencies thereof, so long as such lands are farmed primarily in the direct furtherance of a public function, as determined by the Secretary.

## APPENDIX H

UNITED STATES CODE
TITLE 7—AGRICULTURE
1988 EDITION

7 U.S.C. § 1308(5)(A):

§ 1308. Limitation on payments under wheat, feed grains, upland cotton, extra long staple cotton, honey, and rice programs for 1987 through 1990 crops

Notwithstanding any other provision of law:

(5)(A) The Secretary shall issue regulations—

(i) defining the term "person"; and

(ii) prescribing such rules as the Secretary determines necessary to assure a fair and reasonable application of the limitation established under this section.

Such regulations shall provide that the term "person" does not include any cooperative association of producers that markets commodities for producers with respect to the commodities so marketed for producers.

## APPENDIX I

## OMNIBUS BUDGET RECONCILIATION ACT OF 1987

SEC. 1303. DEFINITION OF PERSON: ELIGIBLE INDIVIDUALS AND ENTITIES: RESTRICTIONS APPLICABLE TO CASH-RENT TENANTS.

Effective beginning with the 1989 crops:

(a) IN GENERAL.—Section 1001(5) of the Food Security Act of 1985 (7 U.S.C. 1308(5)) is amended—

(1) by inserting after the first sentence of subparagraph (A) the following new sentence: "Such regulations shall incorporate the provisions in subparagraphs (B) through (E) of this paragraph, paragraphs (6) and (7), and sections 1001A through 1001C.";

(2) by striking out the second sentence of subparagraph (A) and inserting in lieu thereof the following new subparagraph: . . . .

"(B) (iii) Such regulations shall provide that, with respect to any married couple, the husband and wife shall be considered to be one person, except that any married couple consisting of spouses who, prior to their marriage, were separately engaged in unrelated farming operations, each spouse shall be treated as a separate person with respect to the farming operation brought into the marriage by such spouse so long as such operation remains as a separate farming operation, for the purposes of the application of the limitations under this section.";

* * * *

## APPENDIX J

## DEPARTMENT OF AGRICULTURE REGULATIONS

7 C.F.R. Part 795 (1988)

## PART 795—PAYMENT LIMITATION

### GENERAL

Sec.

795.1 [Reserved]

795.2 Applicability.

795.3 Definitions.

795.4 Family members.

795.5 Timing for determining status of persons.

795.6 Multiple individuals or other entities.

795.7 Entities or joint operations not considered as a person.

795.8 Corporations and stockholders.

795.9 Estate or trust.

795.10 Club, society, fraternal or religious organization.

795.11 Husband and wife.

795.12 Minor children.

795.13 Other cases.

795.14 Changes in farming operations.

795.15 Determination whether agreement is a share lease or a cash lease.

795.16 Custom farming.

795.17 Scheme or device.

795.20 Joint and several liability.

795.21 Appeals.

795.22 Interpretations.

795.23 Paperwork Reduction Act assigned number.

795.24 Relief.

§ 795.1 [Reserved]

§ 795.2 Applicability.

(a) The provisions of this part are applicable to payments when so provided by the individual program regulations under which the payments are made. The amount of the limitation shall be as specified in the individual program regulations.

(b) The limitation shall be applied to the payments for a commodity for a crop year.

(c) The limitation shall not be applicable to payments made to States, political subdivisions, or agencies thereof for participation in the programs on lands owned by such States, political subdivisions, or agencies thereof so long as such lands are farmed primarily in the direct furtherance of a public function. However, the limitation is applicable to persons who rent or lease land owned by States, political subdivisions, or agencies thereof.

(d) The limitation shall not be applicable to payments made to Indian tribal ventures participating in the programs where a responsible official of the Bureau of Indian Affairs or the Indian Tribal Council certifies that no more than the program payment limitation shall accrue directly or indirectly to any individual Indian and the State committee reviews and approves the exemption.

§ 795.3 Definitions.

(a) The terms defined in Part 719 of this chapter, governing reconstitutions of farms, shall be applicable to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) (1) Subject to the provisions of this part, the term "person" shall mean an individual, joint stock company, corporation, association, trust, estate, or other legal entity. In order to be considered to be a separate person for the purposes of this part with respect to any crop, in addition to any other provision of this part, an individual or other legal entity must:

(i) Have a separate and distinct interest in the crop or the land on which the crop is produced;

(ii) Exercise separate responsibility for such interest; and

(iii) Be responsible for payment of the cost of farming related to such interest from a fund or account separate from that of any other individual or entity.

(2) The term "person" shall not include any cooperative association of producers that markets commodities for producers with respect to the commodities so marketed for producers.

(c) The term "family member" shall mean the individual, the great-grandparent, grand-parent, child, grandchild, and great-grandchild of such individual and the spouses of all such individuals.

(d) The term "separate unit" shall mean an individual who, prior to December 31, 1985: (1) Had been engaged in a separate farming operation and (2) in accordance with the provisions of this part,

had been determined to be a separate person or could have so determined under the circumstances existing at such time.

§ 795.4 Family members.

Effective for the 1987 through 1990 crops, an individual shall not be denied a determination that such individual was a "person" solely on the basis that:

(a) A family member cosigns for, or makes a loan to, such individual and leases, loans or gives equipment, land or labor to such an individual; and

(b) Such family members were organized as separate units prior to December 31, 1985.

§ 795.5 Timing for determining status of persons.

Except as otherwise set forth in this part, the status of individuals or entities as of March 1, or such other date as may be determined and announced by the Administrator shall be the basis on which determinations are made in accordance with this part for the year for which the determination is made.

§ 795.6 Multiple individuals or other entities.

The rules in §§ 795.5 through 795.16 shall be used to determine whether certain multiple individuals or legal entities are to be treated as one person or as separate persons for the purpose of applying the limitation. In cases in which more than one rule would appear to be applicable, the rule which is most restrictive on the number of persons shall apply.

§ 795.7 Entities or joint operations not considered as a person.

A partnership, joint venture, tenants-in-common, or joint tenants shall not be considered as a person

but, notwithstanding the provisions of § 795.3, each individual or other legal entity who shares in the proceeds derived from farming by such joint operations shall be considered a separate person, except as otherwise provided in this part, and shall be listed as a producer for payment purposes on program documents. The payment shares listed on the program documents for each individual or other legal entity shall be the same as each individual or other legal entity shares in the proceeds derived from farming by such joint operation. Notwithstanding the foregoing, each individual or other legal entity who shares in the proceeds derived from farming by such joint operation shall not be considered as a separate person unless the individual or other legal entity is actively engaged in the farming operations of the partnership or other joint operation. An individual or other legal entity shall be considered as actively engaged in the farming operation only if its contribution to the joint operation is commensurate with its share in the proceeds derived from farming by such joint operation. Members of the partnership or joint venture must furnish satisfactory evidence that their contributions of land, labor, management, equipment, or capital to the joint operation are commensurate with their claimed shares of the proceeds. A capital contribution may be a direct out-of-pocket input of a specified sum or an amount borrowed by the individual. If the contribution consists substantially of capital, such capital must have been contributed directly to the joint operation by the individual or other legal entity and not acquired as a result of (a) a loan made to the joint operation, (b) a loan which was made to such individual or other legal entity by the joint operation or any of its members or related entities, or (c) a loan made to such individual or other legal entity which was guaranteed by the joint operation or any of its members or related entities.

§ 795.8 Corporations and stockholders.

(a) A corporation (including a limited partnership) shall be considered as one person, and an individual stockholder of the corporation may be considered as a separate person to the extent that such stockholder is engaged in the production of the crop as a separate producer and otherwise meets the requirements of § 795.3, except that a corporation in which more than 50 percent of the stock is owned by an individual (including the stock owned by the individual's spouse, minor children, and trusts for benefit of such minor children), or by a legal entity, shall not be considered as a separate person from such individual or legal entity.

(b) Where the same two or more individuals or other legal entities own more than 50 percent of the stock in each of two or more corporations, all such corporations shall be considered as one person.

(c) The percentage share of the value of the stock owned by an individual or other legal entity shall be determined as of March 1 of the crop year, except that where a stockholder voluntarily acquires stock after March 1 and before the harvest of the crop, the amount of any stock so acquired shall be included in determining the percentage share of the value of the stock owned by the stockholder. Where there is only one class of stock, a stockholder's percentage share of the value of the outstanding stock shall be equal to the percentage of the outstanding stock owned by the stockholder. If the corporation has more than one class of stock the percentage share of the value of the stock owned by a stockholder shall be determined by the Deputy Administrator on the basis of market quotations, and if market quotations are lacking or too scarce to be recognized the percentage share of the value of the stock shall be determined by the

Deputy Administrator on the basis of all relevant factors affecting the fair market value, including the rights and privileges of the various stock issues.

§ 795.9 Estate or trust.

(a) An estate or irrevocable trust shall be considered as one person except that, where two or more estates or irrevocable trusts have common beneficiaries or heirs (including spouses and minor children) with more than a 50-percent interest, all such estates or irrevocable trusts shall be considered as one person.

(b) An individual heir of an estate or beneficiary of a trust may be considered as a separate person to the extent that such heir or beneficiary is engaged in the production of crops as a separate producer and otherwise meets the requirements of § 795.3, except that an estate or irrevocable trust which has a sole heir or beneficiary shall not be considered as a separate person from such heir or beneficiary.

(c) Where an irrevocable trust or an estate is a producer on a farm and one or more of the beneficiaries or heirs of such trust or estate are minor children, the minor children's pro rata share of the program payments to the trust or estate shall be attributed to the parent of the minor children except as otherwise provided in § 795.12.

(d) A revocable trust shall not be considered as a separate person from the grantor.

§ 795.10 Club, society, fraternal or religious organization.

Each individual club, society, fraternal or religious organization may be considered as a separate person to the extent that each such club, society, fraternal

or religious organization is engaged in the production of crops as a separate producer and otherwise meets the requirements of § 795.3.

§ 795.11 Husband and wife.

A husband and wife shall be considered as one person.

§ 795.12 Minor children.

(a) A minor child and his parents or guardian (or other person responsible for him) shall be considered as one person, except that the minor child may be considered as a separate person if such minor child is a producer on a farm in which the parents or guardian or other person responsible for him (including any entity in which the parents or guardian or other person responsible for him has a substantial interest, i.e., more than a 20-percent interest) takes no part in the operation of the farm (including any activities as a custom farmer) and owns no interest in the farm or allotment or in any portion of the production on the farm, and if such minor child:

(1) Is represented by a court-appointed guardian who is required by law to make a separate accounting for the minor and ownership of the farm is vested in the minor, or

(2) Has established and maintains a different household from his parents or guardian and personally carries out the actual farming operations on the farm for which there is a separate accounting, or

(3) Has a farming operation resulting from his being the beneficiary of an irrevocable trust and ownership of the property is vested in the trust or the minor.

(b) A person shall be considered a minor until he reaches 18 years of age. Court proceedings conferring majority on a person under 18 years of age will not change such person's status as a minor for purposes of applying the regulations.

§ 795.13 Other cases.

Where the county committee is unable to determine whether certain individuals or legal entities involved in the production of a commodity are to be treated as one person or separate persons, all the facts regarding the arrangement under which the commodity is produced shall be submitted to the State committee for decision. Where the State committee is unable to determine whether such individuals or legal entities are to be treated as one person or separate persons, all the facts regarding the arrangement under which the farming operation is conducted shall be submitted to the Deputy Administrator for decision.

§ 795.14 Changes in farming operations.

(a) Subject to the provisions of this part, a person may exercise his or her right heretofore existing under law, to divide, sell, transfer, rent, or lease his or her property if such division, sale, transfer, rental arrangement, or lease is legally binding as between the parties thereto. However, any document representing a division, sale, transfer, rental arrangement, or lease which is fictitious or not legally binding as between the parties thereto shall be considered to be for the purpose of evading the payment limitation and shall be disregarded for the purpose of applying the payment limitation. Any change in farming operations that would otherwise serve to increase the number of persons for application of the payment limitation must be bona fide and substantive.

(b) A substantive change includes, for example, a substantial increase or decrease in the size of the farm by purchase, sale, or lease; a substantial increase or decrease in the size of allotment by purchase, sale, or lease; a change from a cash lease to a share lease or vice versa; and dissolution of an entity such as a corporation or partnership.

(c) Examples of the types of changes that would not be considered as substantive are the following:

*Example 1.* A corporation is owned equally by four shareholders. The corporation owns land, buildings, and equipment and in the prior year carried out substantial farming operations. Three of the shareholders propose forming a partnership which they would own equally. The partnership would cash lease land and equipment from the corporation with the objective of having the three partners considered as separate persons for purposes of applying the payment limitation under the provisions of § 795.7 of the regulations.

The formation of such a partnership and the leasing of land from a corporation in which they hold a major interest would not constitute a substantive and bona fide change in operations. Therefore, the corporation and the partners would be limited to a single payment limitation.

*Example 2.* Three individuals each have individual farming operations which, if continued unchanged, would permit them to have a total of three payment limitations.

The three individuals propose forming a corporation which they would own equally. The corporation would then cash lease a portion of the farmland owned and previously operated by the individuals with the objective of having the corporation

considered as a separate person for purposes of applying the payment limitation under the provisions of § 795.8 of the regulations. The formation of such a corporation and the leasing of land from the stockholders would not constitute a substantive and bona fide change in operations. Therefore, the corporation and the three individuals would be limited to three payment limitations.

§ 795.15 Determining whether agreement is a share lease or a cash lease.

(a) *Cash lease.* If a rental agreement contains provisions for a guaranteed minimum rental with respect to the amount of rent to be paid to the landlord by a tenant, such agreement shall be considered to be a cash rental agreement. In addition, the rental agreement must be customary and reasonable for the area.

(b) *Share lease.* If a rental agreement contains provisions that require the payment of rent on the basis of the amount of the crop produced or the proceeds derived from the crop, such agreement shall be considered to be a share rental agreement. In addition, the rental agreement must be customary and reasonable for the area.

§ 795.16 Custom farming.

(a) Custom farming is the performance of services on a farm such as land preparation, seeding, cultivating, applying pesticides, and harvesting for hire with remuneration on a unit of work basis, except that, for the purpose of applying the provisions of this section, the harvesting of crops and the application of agricultural chemicals by firms regularly engaged in such businesses shall not be regarded as custom farming. A person performing custom farm-

ing shall be considered as being separate from the person for whom the custom farming is performed only if:

(1) The compensation for the custom farming is paid at a unit of work rate customary in the area and is in no way dependent upon the amount of the crop produced, and (2) the person performing the custom farming (and any other entity in which such person has more than a 20-percent interest) has no interest, directly or indirectly, (i) in the crop on the farm by taking any risk in the production of the crop, sharing in the proceeds of the crop, granting or guaranteeing the financing of the crop, (ii) in the allotment on the farm, or (iii) in the farm as landowner, landlord, mortgage holder, trustee, lienholder, guarantor, agent, manager, tenant, sharecropper, or any other similar capacity.

(b) A person having more than a 20-percent interest in any legal entity performing custom farming shall be considered as being separate from the person for whom the custom farming is performed only if:

(1) The compensation for the custom farming service is paid at a unit of work rate customary in the area and is in no way dependent upon the amount of the crop produced, and (2) the person having such interest in the legal entity performing the custom farming has no interest, directly or indirectly, (i) in the crop on the farm by taking any risk in the production of the crop, sharing in the proceeds of the crop, granting or guaranteeing the financing of the crop, (ii) in the allotment on the farm, or (iii) in the farm as landowner, landlord, mortgage holder, trustee, lienholder, guarantor, agent, manager, tenant, sharecropper, or in any other similar capacity.

§ 795.17 Scheme or device.

All or any part of the payments otherwise due a person under the upland cotton, wheat, feed grain and rice programs on all farms in which the person has an interest may be withheld or required to be refunded if the person adopts or participates in adopting any scheme or device designed to evade or which has the effect of evading the rules of this part. Such acts shall include, but are not limited to, concealing from the county committee any information having a bearing on the application of the rules of this part or submitting false information to the county committee (for example, a set-aside agreement which is entered into that differs from information furnished to the county committee concerning the manner in which program payments are actually shared, concerning the actual facts of a sale, or concerning the transfer of property) or creating fictitious entities for the purpose of concealing the interest of a person in a farming operation.

§ 795.20 Joint and several liability.

Where two or more individuals or legal entities, who are treated as one person hereunder, receive payments which in the aggregate exceed the limitation, such individuals or legal entities shall be liable, jointly and severally, for any liability arising therefrom. The provisions of this part requiring the refund of payments shall be applicable in addition to any liability under criminal and civil fraud statutes.

§ 795.21 Appeals.

Any person may obtain reconsideration and review of determinations made under this part in accordance with the appeal regulations, Part 780 of this chapter, as amended.

§ 795.22 Interpretations.

In interpretations previously issued pursuant to the payment limitation regulations and published at 36 FR 16569, 37 FR 3049, 39 FR 15021 and 41 FR 17527 shall be applicable in construing the provisions of this part.

§ 795.23 Paperwork Reduction Act assigned number.

The information collection requirements contained in these regulations (7 CFR Part 795) have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB control number 0560-0096.

§ 795.24 Relief.

If a producer relied on a county committee and/or State committee "person" determination for a crop year and higher reviewing authority makes a more restrictive determination, the Deputy Administrator may grant relief only for such crop year if the producer was not afforded an opportunity to exercise other alternatives with respect to the producer's farming operation and the program provisions and the county committee has determined that the producers acted in good faith based upon the original "person" determination.

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-366

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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WOMEN INVOLVED IN FARM ECONOMICS, PETITIONER

*v.*

CLAYTON K. YEUTTER, SECRETARY OF AGRICULTURE, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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JOHN G. ROBERTS, JR.
*Acting Solicitor General*
STUART M. GERSON
*Assistant Attorney General*
WILLIAM KANTER
PETER R. MAIER
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

16 pp

## QUESTION PRESENTED

Whether a court reviewing the validity of an agency regulation may rely upon the agency counsel's explanation for the regulation in the unique circumstance where the challenged regulation was promulgated nineteen years ago at a time when the agency had no obligation under the Administrative Procedure Act to create a contemporaneous record justifying its action.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 876 F.2d 994. The district court's memorandum opinion (Pet. App. 30a-48a) is reported at 682 F. Supp. 599.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on June 2, 1989. The petition for a writ of certiorari was filed on August 31, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATEMENT

1. In 1970, Congress reacted to public criticism of the large sums of money certain farmers received through agricultural support programs by limiting the total payments a person may receive under these programs. Agricultural Act of 1970, § 101(1), 7 U.S.C. 1307(1). Congress delegated to the Secretary of Agriculture the task of promulgating regulations defining the term "person" under the statute. See Section 101(4), 7 U.S.C. 1307(4).

The regulations, which were issued within weeks of the enactment of the statute, provided that to be considered a separate person for the purpose of the payments limitation, an individual or legal entity must have a distinct interest in the land on which a crop is produced, exercise separate responsibility for such an interest, and be entirely responsible for payment of the cost of farming related to that interest. 7 C.F.R. 795.3. Based on the assumption that married couples generally shared responsibility for their family's farm, the regulations also provided that husbands and wives could not collect individualized benefits. 7 C.F.R. 795.11. In 1987, Congress codified the husband-wife rule, but instructed the Secretary to modify the regulations to exempt married couples who, prior to their marriage, separately engaged in unrelated farming operations and who continued to operate these farms as separate entities after marriage. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303(a)(2), 101 Stat. 1330-16. The Secretary has since published regulations implementing the 1987 amendments. See 53 Fed. Reg. 29,552, 29,556 (1988) (codified at 7 C.F.R. 795.11).

2. In this action, petitioner Women Involved in Farm Economics (WIFE), a national organization of women involved in farming and agriculture, challenged the husband-wife rule as applied to the 1988 crop year under the Administrative Procedure Act (APA) and the Fifth Amendment. The district court found in favor of petitioner on both grounds and entered an order enjoining respondents from enforcing the husband-wife regulation. Pet. App. 30a-48a.

3. A unanimous court of appeals reversed. The court rejected petitioner's contention that the husband-wife rule violated the equal protection component of the Fifth Amendment. Relying on this Court's opinion in *Lyng* v. *Castillo*, 477 U.S. 635 (1986), the court stated that "Congress constitutionally may legislate with a family model in mind that reflects economic and social reality." Pet. App. 25a. The husband-wife rule is therefore rational, the court held, because, like community property regimes and certain sections of the Internal Revenue Code, it takes into account the financial interdependence of husband and wife. *Id.* at 21a. The rationality requirement of the Fifth Amendment, the court stated, "requires no more precision than this." *Id.* at 27a.[1]

The court also reversed the district court's holding that the husband-wife rule was arbitrary and capricious. In so doing, the court noted that because the rule concerned "a matter relating to * * * public * * * benefits," 5 U.S.C. 553(a)(2) (1982), it was promulgated under an exception to the general requirement of the APA that published rules be accom-

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[1] Petitioner does not seek further review of this portion of the court of appeals' decision.

panied by "a concise general statement of their basis and purpose." 5 U.S.C. 553(c) (1982). Pet. App. 8a. The court recognized that under these "unusual circumstances," in which the agency had no obligation to furnish a contemporaneous explanation of its action, judicial review of the regulation must be based on the administrative record generated by agency counsel for the purpose of this litigation. Accordingly, the court held that it may give "at least some weight" to counsel's explanation for why the Secretary promulgated the husband-wife rule in 1970. *Id.* at 7a-8a.

The court stated that its reliance on counsel's explanation for the husband-wife rule did not conflict with the principle laid down by this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 83 (1943), that agencies, not courts, should provide justifications for agency action. The core concern of *Chenery Corp.*, the court stated, was that a court, through the process of judicial review, might adopt an explanation for a rule that had not been endorsed by the head of the agency. The Court feared that such action might restrict the agency's freedom to make policy in the future. The court of appeals held, however, that reliance on counsel's representations in this case did not pose similar dangers when the challenged regulation is nearly twenty years old and the agency's litigation task is "essentially historical" rather than "administrative policymaking." Pet. App. 11a. The court also held that under these unusual circumstances it was not necessary for counsel to procure an affidavit from the present Secretary confirming that counsel's representations accurately reflected the position of the agency. Such an affidavit, the court stated, would

add little to the court's understanding of why the challenged regulation was promulgated in 1970.[2]

The court proceeded to find that the Secretary's definition of the statutory term "person"—which included the husband-wife rule—was a legitimate interpretation of the statute. First, the court rejected petitioner's contention that the husband-wife rule was arbitrary because it created an irrebuttable presumption that married couples are not separate persons. The court held that because "the husband and wife working together on a family farm typically enjoy certain unique efficiencies" the Secretary could reasonably conclude that Congress authorized him to treat married couples as one person for the purpose of limiting farm support payments. Pet. App. 15a. The court acknowledged that there may be "the occasional family farms where husbands and wives * * * independently consume the fruits of their respective labors," but concluded that the administrative difficulty of drafting an exception for such economically independent husbands and wives justified the Secretary's decision simply to use marital status as a proxy for financial interdependence. Pet. App. 15a-16a.

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[2] In addition, the court noted that counsel's assertion that the husband-wife rule fell within the bounds of the Agricultural Act of 1970 was supported by special indicia of reliability. First, counsel's representations in this litigation were consistent with the position taken by the agency in similar litigation that took place eight years ago. In addition, the court found that the husband-wife rule was consistent with the legislative history of the Act. In particular, the court noted that the husband-wife rule bore a strong resemblance to draft regulations proposed during a congressional floor debate on the 1970 Act. Pet. App. 12a-13a.

Finally, the court disagreed with petitioner's contention that the Secretary's decision to declare all married couples ineligible for separate payments conflicted with the Agricultural Act's overall purpose of maximizing participation in the farm subsidy program and diverting acreage from production. The court acknowledged that the husband-wife rule might lead to results contrary to some goals of the statute, but found that the rule was entirely consistent with the provisions of the Act that limited payments under the programs and gave the Secretary authority to issue rules designed to assure a reasonable application of those limitations. Pet. App. 17a-19a. Accordingly, the court held that the husband-wife rule comported with the policy of the statute.

## ARGUMENT

The decision of the court of appeals is a well-reasoned application of the general principles that guide APA review to the unusual situation in which the regulation being challenged was promulgated nineteen years ago under an exception to the APA that relieved the agency from its obligation to produce a contemporaneous statement explaining the regulation's basis and purpose. The court of appeals correctly held that under these circumstances a reviewing court may give some weight to explanations for the rule provided by agency counsel. The court also properly determined that the Secretary acted within the scope of the authority granted to him under the Agricultural Act of 1970 when he issued the husband-wife rule. The court of appeals' decision is consistent with the decisions of this Court and other courts of appeals. Further review of this case is, therefore, unwarranted.

1. Petitioner's many disagreements with the decision of the court of appeals amount to a single claim that the court improperly applied the arbitrary and capricious standard of review under Section 706 of the APA. Petitioner contends (Pet. 13-18) that the court departed from past precedent by considering agency counsel's explanations for the husband-wife rule instead of demanding that current or past employees of the agency explain the genesis of this regulation. Petitioner also claims (Pet. 8-13) that the court erred by examining the rationality of the husband-wife rule itself rather than scrutinizing the agency's decisionmaking process.

a. The court of appeals' decision to rely on agency counsel's explanation, however, was entirely appropriate in light of the unusual context of this case. Unlike most challenges to agency action, which ordinarily take place soon after a rule is promulgated, petitioner is contesting action that took place nearly twenty years ago. Moreover, because the rule concerned "a matter relating to * * * public * * * benefits," 5 U.S.C. 553(a)(2) (1982), it was promulgated under an exception to the APA's general requirement that a rule be accompanied by a concise statement explaining its purpose. Thus, the agency did not issue a contemporaneous explanation of the rule. Nor was there a record of agency proceedings. Thus, out of necessity, judicial review of the husband-wife rule must be based on some form of after-the-fact explanation. In these circumstances, as the court of appeals explained, it was not improper to give "at least some weight" (Pet. App. 8a) to counsel's explanation for the basis of the rule. At this remote point in time, as the court observed, "[i]t is possible, perhaps likely, that no one presently in the

agency has any better knowledge of the exact reasons that underlay the adoption of the rule than agency counsel." Pet. App. 11a. Consequently, a rigid exclusion of any explanation from counsel in this setting would merely substitute one form of "post-hoc rationalization" for another.

Contrary to petitioner's assertions, the court's decision to rely, in part, on representations by agency counsel does not conflict with this Court's holdings in *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), or *Camp* v. *Pitts*, 411 U.S. 138 (1973). In both of those cases the agency had compiled a contemporaneous administrative record that could be used for the purpose of judicial review. *Overton Park*, 401 U.S. at 419; *Camp*, 411 U.S. at 142. This Court held that when such a record exists, a reviewing court should not rely upon the post-hoc rationalizations for the agency's action presented in litigation affidavits. 401 U.S. at 419.[3] But in the present case, no such administrative record was created. Thus, the general principle that reviewing courts should rely upon contemporaneous rather than post-hoc explanations for an agency decision is inapplicable here.

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[3] Petitioner implies that the *Camp* Court objected to the use of post-hoc rationalizations by agency counsel. Pet. 14. It did no such thing. Rather, the Court reversed the court of appeals' ruling that the case be remanded to the district court for a trial de novo. 411 U.S. at 142. Such a proceeding, the court held, was inappropriate when the agency had compiled an "extensive administrative record" which had been "presented to the reviewing court." *Ibid.* *Camp*, however, does not address the question how a reviewing court should proceed when the agency has not compiled a contemporaneous administrative record.

The decision of the court of appeals is also consistent with *SEC* v. *Chenery Corp.*, *supra*. As the court of appeals noted, the primary reason why the *Chenery* Court required that agencies disclose the reasons for their actions to reviewing courts was to prevent those courts from "intrud[ing] upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U.S. at 88. But in the present case, where the agency exercised its rulemaking authority nineteen years ago, the court's reliance upon justifications for the husband-wife rule provided by agency counsel did not interefere with the agency's policymaking function. The agency policy was set long ago and has been applied consistently over the past two decades. Nothing a reviewing court does in this case will affect the way the agency interprets or applies the husband-wife rule in the future.

b. Petitioner further complains that the court of appeals did not scrutinize the decisionmaking process of the agency, as required under the arbitrary and capricious standard, but instead focused on whether the husband-wife rule was a legitimate interpretation of the Agricultural Act of 1970. Petitioner suggests that the court should have required the agency to produce witnesses and documents bearing on the 1970 decisionmaking process and should then have scrutinized the actual basis for the Secretary's action. Pet. 11 & n.7.

In the peculiar posture of this case, however, there is no reason to believe that the lower court's task of reviewing the husband-wife rule would have been a more meaningful or accurate inquiry if the current Secretary or other employees of the Department of Agriculture were made responsible for the primarily historical exercise of explaining why the husband-wife rule was promulgated in 1970. As the court of

appeals noted, in all likelihood such testimony would "add little" to the explanations for the husband-wife rule provided by counsel. Pet. App. 12a.[4]

Once the counsel's justifications for the rule are accepted as the best possible reconstruction of what occurred in 1970, it is clear that the court did scrutinize, and ultimately accept as reasonable, the Secretary's rule. As the court of appeals noted, the Secretary decided to prohibit married couples from receiving individualized (double) payments under the farm support programs because he believed that a husband and wife living together on a family farm comprised a single, interdependent economic unit. Pet. App. 14a-15a. The court concluded that in light of Congress's desire to cut back on excessive farm support payments it was entirely appropriate for the Secretary to consider the interdependence of married couples who own family farms. *Id.* at 18a. Thus, the court of appeals properly concluded that the husband-wife rule represented a reasonable decision by the Secretary that comported with the rationale of the Agriculture Act of 1970. Petitioner presents no reason why this Court should review this highly fact-bound inquiry.

2. Petitioner's contention that the court of appeals' decision conflicts with *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), is unfounded. As the Fifth Circuit quite clearly stated, the challenged regulation in that case was promulgated pursuant to Section 553 notice and comment rulemaking and, contary to the situation in the present case, the Secretary of Agriculture was required to set forth a

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[4] That the agency is represented by the U.S. Attorney's Office instead of the agency's general counsel is, of course, irrelevant.

statement of the regulation's purpose. 767 F.2d at 118.[5] Thus, *Garner* does not raise the question addressed by the court of appeals of whether counsel's explanation for a regulation may be considered when the agency is not obligated, under the APA, to issue a contemporaneous explanation for its action. In cases in which this question has arisen, other courts of appeals have refused to hold a regulation invalid simply because the agency did not compile a contemporaneous record. See, *e.g.*, *Bedford County General Hospital* v. *Heckler*, 757 F.2d 87, 90 (6th Cir. 1985); *Holy Cross Hospital-Mission Hills* v. *Heckler*, 749 F.2d 1340, 1346 (9th Cir. 1984). Thus, there is no conflict among the circuits that warrants this Court's review.

3. Finally, the issue that petitioner asks this Court to review is of no prospective significance. In 1987, Congress enacted legislation that expressly requires the Secretary to adopt a new version of the husband-wife rule, see Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303(a)(2), 101 Stat. 1330-16, and new regulations have been promulgated implementing that legislation, see 53 Fed. Reg. 29,552, 29,556 (1988) (codified at 7 C.F.R. 795.11). Moreover, questions about the proper use of counsel's explanation for regulations adopted without any contemporaneous statement of basis and purpose are unlikely to recur, because the Secretary has since 1971

[5] The regulation at issue in *Garner*, like the one challenged here, was exempt from the notice and comment requirements of the APA under 5 U.S.C. 553(a)(2) (1982). In 1971, however, the Department of Agriculture promulgated a regulation that made the procedural requirements of the APA applicable to all actions involving loans, such as the one in that case. 767 F.2d at 118 n.21.

subjected such regulations to the procedural requirements of Section 553 of the APA. See 53 Fed. Reg. 13,804 (1971). Consequently, there is little reason to believe that questions about the validity of the 1970 regulations, or about the unusual administrative law question generated by those regulations, will arise in the future.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General* *

STUART M. GERSON
*Assistant Attorney General*

WILLIAM KANTER
PETER R. MAIER
*Attorneys*

NOVEMBER 1989

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* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 262203 624

Supreme Court, U.S.
FILED
DEC 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-366

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

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WOMEN INVOLVED IN FARM ECONOMICS,
*Petitioner*,

v.

CLAYTON YEUTTER, SECRETARY OF AGRICULTURE,
and UNITED STATES DEPARTMENT OF AGRICULTURE,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF FOR PETITIONER

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J. MICHAEL HEMMER
MITCHELL F. DOLIN *
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
*Attorneys for Petitioner*

* Counsel of Record

December 1989

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The government's opposition to petitioner's application for review is designed primarily to persuade the Court that the effects of the D.C. Circuit's ruling are limited to what it calls the "peculiar posture" of this case, Opp. at 9, and to divert attention from a remarkable departure from principles that have long guided judicial review of agency action. This effort to camouflage important and recurring issues of administrative law must fail. The lower court's ruling adopts an unprecedented and highly deferential standard of review for certain categories of agency action that, if left standing, would not only confuse lower courts and litigants in future cases, but also would encourage federal agencies to thwart effective judicial review.

We initially demonstrate that, as conceded by the lower court, the questions presented have "implications that go far beyond this case." Pet. App. at 8a. We then show that the government has failed to harmonize the lower court's ruling with precedents of this Court and courts in other circuits. Indeed, the conflict created by the D.C. Circuit panel is plain enough to justify summary reversal.

1. The key issue presented is whether arbitrary-and-capricious judicial review under Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988), can proceed without an examination of the agency's *actual* decision-making process in cases where the agency's action was exempt from the procedural requirements of the APA's Section 553.[1] The government seeks to minimize the importance of this issue with repeated references to the 1970 vintage of the agency regulation under review and the "unusual context" of this case. Opp. at 4, 6, 7, 9, 12. This rhetoric cannot obscure the obvious facts that countless categories of significant agency action are exempt from Section 553 or equivalent procedural requirements and that the lower court's new rule of administrative law would erode meaningful judicial review of all such action. Moreover, even beyond the decision's impact in other administrative law contexts, the ruling below, if left standing, would have a severe and discriminatory financial impact on independent women farmers throughout the country.

When Judge Silberman noted below that the panel opinion would have "implications that go far beyond this case," Pet. App. at 8a, he presumably was aware

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[1] The government entirely ignores petitioner's third question presented, which essentially asks whether the Secretary of Agriculture's use of a rule automatically treating married farm couples as "one person" is inherently irrational and conflicts with this Court's ruling in *United States* v. *Dege*, 364 U.S. 51 (1960), a decision the court below, like the government here, did not even attempt to distinguish.

that numerous types of agency action are not subject to Section 553 procedural requirements and that, in the future, such action would be entitled to his extremely deferential standard of arbitrary-and-capricious review. By its own terms, Section 553 exempts rulemakings that involve "military or foreign affairs" or that relate to "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a). Moreover, regardless of subject matter, Section 553 does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.*, § 553(b). Professor Davis, complaining that "[t]he exemptions from the required procedure of § 553 are too extensive," has observed that "more rulemaking is done without notice and comment procedure than with it." 1 K. Davis, *Administrative Law Treatise* § 6:30, at 593 (2d ed. 1978).[2] Under the decision below, such rulemaking will be subject to a relaxed standard of judicial review under Section 706(2)(A). Aside from these rulemaking procedures, many other types of agency action are exempt from Section 553 or equivalent procedural requirements, including informal adjudications and agency refusals to act. A rule liberating all of these categories of agency action from meaningful judicial review would have a baleful impact on administrative law and practice as we know it.

Furthermore, the facts of this case alone are sufficiently compelling to warrant this Court's review. In defending the Secretary of Agriculture's one-person rule below, the government insisted that invalidation of that rule would expose it to additional crop-subsidy payments to farm wives of at least $182 million annually. *See* Pet. App. at

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[2] There are, of course, countless administrative rules on the books that predate the APA and, thus, would never have been subject to Section 553 procedural requirements. Many such old rules continue to have significant impact and are the subject of legal challenges today. *E.g., Lever Bros. Co.* v. *United States*, 877 F.2d 101, 105 (D.C. Cir. 1989).

44a-45a; *see also* Brief for Appellants, at 9, 11, 32 (D.C. Cir.). According to the government's litigation affidavit, these obligations could implicate 6,500 farmers throughout the country. If the D.C. Circuit's reversal of the district court's ruling is upheld, the Secretary will be able to pursue repayment of any funds the government paid during the 1988 crop year as a result of the district court's injunction. *See* Pet. App. at 7a n.3. In light of this, it is nothing less than callous for the government to suggest that this case has "no prospective significance." Opp. at 11.

2. The government has skirted entirely the straightforward issue of statutory construction and application posed by this case. Section 706(2)(A) of the APA proscribes "agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This Court has held repeatedly that Section 706(2)(A) judicial review must focus on the reasonableness of the agency's actual decisionmaking process and the extent to which it reflected consideration of all relevant factors. The decision below jettisons this longstanding principle by accepting any explanation for the agency's action that can be conceived by its lawyers after the fact.

Nothing in the text of Section 706(2)(A) or this Court's relevant precedents relaxes the intensity of judicial review where an agency's action was exempt from the procedural requirements of Section 553. While the existence of such procedural requirements is clearly relevant to a challenge under 706(2)(D)—which proscribes agency action taken "without observance of procedure required by law"—the scope and content of arbitrary-and-capricious review under Section 706(2)(A) have never before turned on the existence of Section 553 procedural requirements.[3]

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[3] The Fifth Circuit's opinion in *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), carefully analyzed the precise question

To the contrary, this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416-21 (1971), expressly subjected agency action exempt from Section 553 procedural requirements to the full force of Section 706(2)(A)'s "searching and careful" judicial inquiry into the reasonableness of the agency's actual decisionmaking process. The government attempts to distinguish *Overton Park* on the ground that there was an administrative record in that case. Opp. at 8. But even a cursory examination of that opinion reveals that this Court's ruling on the scope of Section 706(2)(A) review did not rest on the fortuitous presence of an administrative record. The Court merely noted that the presence of such a record, if properly evaluated, might permit judicial review to proceed without a remand to the agency. 401 U.S. at 419. Significantly, even though there was an administrative record, the Court held that the petitioner would be able to supplement it with testimony from agency officials, *id.* at 420, a procedure foreclosed by the decision below.[4]

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presented here and squarely conflicts with the decision below. The government's attempt to reconcile the two decisions is simply untenable. *See* page 8, below.

[4] The government asserts that an administrative record was not created here and that testimony by agency officials would "in all likelihood . . . 'add little'" to the explanations of agency counsel. Opp. at 8, 10. As far as we can tell, the government has never attempted either to ascertain whether a record exists or to identify the participants in the 1970 rulemaking. Instead, agency counsel has done nothing but hypothesize about why the agency may have done what it did in 1970. Counsel has done so by relying on the resemblance of the one-person rule to a floor amendment *defeated* in 1970 and on an estimate of the *1988* cost of abandoning the rule. Curiously enough, the government seeks to discourage this Court from undertaking a "highly factbound inquiry," Opp. at 10, yet the government has no qualms about the D.C. Circuit having reversed the district court on the basis of speculation about facts—a role inappropriate for *any* reviewing court. Petitioner is not asking this Court to conduct a "factbound inquiry," but merely to apply the correct rules of law and to remand to the district court for a reconstruction of what actually did happen within the administrative agency.

The rule adopted by the D.C. Circuit would create a perverse incentive for agencies to avoid creation of administrative records as a means of shielding their actions from meaningful judicial review. By avoiding creation of a record, agencies would enjoy free rein to act for hidden or even forbidden reasons, confident that they could later justify their actions with *post hoc* excuses and rationalizations. Section 706(2)(A) requires in all cases that an agency establish that its actual decisionmaking process was not arbitrary and capricious. A writ should issue to resolve the plain conflict created by the D.C. Circuit's departure from this Court's prior rulings construing Section 706(2)(A).

3. The government also stoutly defends the virtues of judicial review of government counsel's representations rather than the reasoning of the agency. Opp. at 7-10. The government fails to marshal even a single decision of this Court or any other that supports its argument or the rationale developed by the D.C. Circuit. This is hardly surprising, as acceptance of counsel's rationalizations flies in the face of the black-letter rule that "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962).

The government suggests an exception. It argues that the proscription applies only where the agency publicly compiled an administrative record and has no application in a case such as this where the agency acted in expedient secrecy. Opp. at 8 n.3. But this Court's *per curiam* decision in *Camp* v. *Pitts*, 411 U.S. 138 (1973), entirely disposes of that argument. While the government correctly notes that the agency had compiled a modest administrative record in that case, it was so thin that the Court issued clear instructions to reviewing courts concerning their duties where, as here, there has been "such failure to explain administrative action as to frustrate effective judicial review." 411 U.S. at 142-43. *Camp* teaches that,

under those circumstances, the appropriate course is "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Id.* at 143. The D.C. Circuit itself has adopted similar instructions. *AT&T Information Sys., Inc.* v. *GSA*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) ("'new material should be merely explanatory of the original record and should contain no new rationalizations'") (citation omitted). The D.C. Circuit panel's failure to follow those instructions in this case requires reversal.

The government, like the court below, speculates that counsel's arguments in this instance are as likely to reflect the Secretary's thinking in 1970 as any other source of information. Indeed, the government offers the remarkable assertion that counsel's rationalizations are "the best possible reconstruction of what occurred in 1970." Opp. at 10. This is obviously wrong. Government counsel's explanations of the Secretary's 1970 actions are based on either pure speculation or events after 1970. That suspect reconstruction obviously carries no more indicia of reliability than our own, which is precisely why courts review agency action, not lawyers' inventiveness.

The Court's decision in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), certainly does not support the lower court's reliance on counsel's speculation. The government blithely asserts that *Chenery*'s proscription against judicial assumption of the agency function dissipates when the agency acted in the past and its rule is no longer in effect. Opp. at 9. In other words, according to the government, when an agency's action has been superseded, a reviewing court is free to "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U.S. at 88. Under that theory, an agency's revision of its rules or regulations would nullify the right to meaningful judicial review of all who were adversely affected by the prior rule.

*Chenery*, of course, admits no such exception. Indeed, such intrusions are precisely what *Chenery* forbids. Petitioner's members, independent working farmers, were adversely affected by the Secretary's prior rule and were deprived of payments that were made to all other classifications of independent farmers. They are entitled to meaningful judicial review of that action, not review of the arguments made by lawyers from the Department of Justice.

Nor is it true, as the government asserts, that the conflict between the decision below and the Fifth Circuit's decision in *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), is more apparent than real. Although the *Garner* court noted that the agency regulation under review was promulgated pursuant to Section 553 notice-and-comment rulemaking, that rule was—like the one-person rule—issued without the concise general statement required by Section 553(c) or "any explanation at all for the Secretary's promulgation." 767 F.2d at 110, 118. Unlike the panel below, however, the Fifth Circuit's well-reasoned decision thoroughly analyzed and flatly rejected the government's claims that arbitrary-and-capricious review should be diluted and counsel's *post hoc* explanation for the regulation credited. *Id.* at 118 & n.22, 121-23. The decision below cannot be reconciled with the Fifth Circuit's holding or with the decisions of this Court upon which it was based.

## CONCLUSION

For the foregoing reasons and those set forth in its petition, petitioner respectfully submits that a writ should issue to review all three questions presented.

Respectfully submitted,

J. MICHAEL HEMMER
MITCHELL F. DOLIN *
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
*Attorneys for Petitioner*

December 1989

* Counsel of Record